

**PROPERTY CRIME AND THE CRIMINAL PROCESS IN LUSAKA MAGISTRATES'
COURTS.**

BY

KALOMBO THOMSON MWANSA.

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ABSTRACT

This thesis investigates the etiology of property crime in Lusaka, Zambia, as well as the way in which it has been dealt with by the criminal justice system, namely, the police, the courts and the prisons.

The thesis is divided into 9 chapters. Chapter 1, the Introduction reviews the literature, discusses the methodology and describes the setting. Chapter 2 discusses customary criminal law and punishment, criminal justice during the colonial period, and the received criminal law and punishment. It also looks at the structure of the subordinate courts, the prosecution system and legal representation. Chapter 3 looks at the incidence and the etiology of property crime (the background characteristics of offenders), the offenders' preferred methods of attack, and the motivation for crime. It then discusses recidivism and criminal careers. Chapter 4 discusses pre-trial procedure, i.e., the circumstances of arrest and the role of both the police and members of the public in the arrest of suspects and offenders and the question of bail. It also examines the nature of the police-suspect encounter and the factors considered by the police in making the decision to prosecute.

Chapter 5 discusses the trial process, i.e, it examines the circumstances under which both the police and complainants withdraw cases before judgment is delivered. It also looks at the cases which were dismissed and those which ended in the acquittal of defendants.

Chapters 6 and 7 discuss the principles of sentencing which magistrates followed in imposing both the sentence of imprisonment and various non-custodial measures. Chapter 8 examines the role of both the criminal justice system and members of the public in the prevention of property crime. Chapter 9 concludes the thesis and makes suggestions for reform.

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CHAPTER 1.

INTRODUCTION

1:1 Zambia in Brief.

The history of Zambia has been ably documented elsewhere¹, as have its social, economic and social systems². What is attempted here is only a summary aimed at putting this study in its proper context.

Zambia, formerly known as Northern Rhodesia, lies in the southern part of Central Africa. It is a land-locked country surrounded by 8 countries³. Most of its inhabitants, who number about 7.5 million, trace their origin from the once powerful Mwatayanvo Kingdom in the then Congo (now Zaire), having immigrated to this area some 400-500 years ago⁴.

Among the earliest European visitors was Dr. David Livingstone, who travelled extensively across the country where he died in 1873. His death inspired many European merchants and missionaries to carry on from where he left. One of these merchants was Cecil Rhodes (from whose name the country later acquired its own) whose British South Africa Company (B.S.A.Co.) ruled the country between 1890-1924.

Until 1911, the B.S.A.Co ruled the country as two separate territories, i.e the North-Eastern and North-Western Rhodesia. In 1911, the two territories were amalgamated and acquired the name Northern Rhodesia. In 1924, the British Government took over the direct control of the country as a protectorate. The country became independent in 1964 and acquired its present name, Zambia.

During its rule, the B.S.A.Co. introduced the common law system in Northern Rhodesia. But the full entrenchment of the common law really began with Crown rule in 1924 which ushered in a new criminal justice system. The African customary law and punishment which existed at that time and the manner in which the colonial power treated it will be discussed in chapter 2.

The end of the Second World War marked an increase in political activities among people still under colonial rule. Many were inspired by the Indian struggle for independence which was achieved in 1947. On the African continent, the pace was set by Ghana's independence ten years after that of India's in 1957.

In Zambia the struggle for independence began in 1948 following the formation of the African National Congress (A.N.C.), but it was the splinter group, the United National Independence Party (U.N.I.P) which won the 1964 general elections and formed the first African government in October of that year, with the A.N.C in opposition.

The country was turned into a one party state in 1973 and it remained so until 1990 when that system was abolished. The following year, general elections were held in which a new party, the Movement for Multi-Party Democracy (M.M.D) formed only 12 months previously, won 83% of the parliamentary seats, 85% of the presidential vote and formed the government.

The economy has been dominated by copper. Thus in 1964, 88% of the total exports was copper and between 1980-1983, it contributed an average of 98% to the total exports⁵. Copper

revenues have not been used to diversify the economy. Consequently, manufacturing and agriculture remain undeveloped.

At independence in 1964, the country inherited one of the strongest economies in Africa with bright prospects for growth. Today, Zambia is many times poorer than it was in 1964. Inflation stands at 135% as a legacy of the command economy of the last 27 years. Inequalities have deepened. Thus by 1976, 40% of the population nation-wide shared 8% of the nation's income whilst the richest 5% shared 36%. By 1985, 10% of the population controlled 80% of the nation's income whilst 90% of the population shared the remaining 20%⁶. The current national debt, at \$7 billion is among the highest in Africa. In 1991, the United Nations granted Zambia the "least developed country status", four years after the first application was refused⁷.

1:2 The Aim of the Thesis.

The coming of British rule to the territories, later named Northern Rhodesia and now called Zambia, was accompanied by the introduction of a new criminal law and new criminal justice institutions, namely, the police, the courts and prisons.

The Northern Rhodesian Police Force did not emerge as a civil force to protect life and property and to perform other civil duties in the conventional sense. Rather it was raised as a military force (later known as Northern Rhodesia Regiment), whose main task was to combat the slave trade and to create conditions for legitimate commerce in the 1890s. Later, when the colonial rule was firmly established the regiment became an instrument of

state power.

During the colonial period, police-public relations were strained. It was widely expected that after independence in 1964 relations would be harmonised. Changes designed, for instance, to cast aside the military outlook of the police were eagerly awaited. Similarly, measures designed to change the "law and order" image of the police and prepare them for civil and wider functions such as prosecution and crime prevention were expected. Above all, the question of the general orientation of the police force together with the system of accountability were expected to be addressed. None of these changes came.

Indigenous criminal process which encouraged public participation in hearings and which was somewhat inquisitorial, but reconciliatory, was replaced by the adversarial system. The traditional system of compensation of victims was replaced by the punishment of offenders, emphasis being placed on imprisonment. As was the case with the police force, certain changes were expected here after independence. In particular, it was expected especially by the ordinary people that some traditional remedies were to be revived and encouraged. The often incomprehensible rule that the state is the "victim" of crime rather than the complainant was to be modified. In other words, rules designed to fulfil the interests of the complainant first and foremost rather than those of an "abstract" entity called the state were to be introduced. These changes never came. Instead, the new independent government abolished all unwritten criminal law under Article 18(8) of the Constitution. Customary criminal law,

its remedies and procedures are therefore not part of the criminal law of Zambia, as they are unwritten.

Professor Allott has pointed out that one of the aims of criminal justice is to satisfy the consumers whose problems are brought to the official attention (consumer related aim⁸). With this aim of criminal justice in mind and against the above background, this thesis seeks to show that:

(1) There is a lack of coordination in the way various wings within the same organs of the criminal justice system as well as different organs deal with property crime, despite the fact that resources in the Zambian criminal justice are few and need to be harnessed. It will be shown that at the crucial points in the criminal process, i.e, at the stages of arrest, prosecution, sentencing and crime prevention the system is riddled with conflicting policies and practices which have rendered it dysfunctional.

(2) The criminal justice system today is substantially the same as it was when it was introduced by the colonial power, some 68 years ago, with the exception of the "open air" prisons which were established 7 years ago. In other areas, the system has been worsened rather than improved, for instance, by the introduction of minimum sentences. Many of the features of the colonial system such as the undue emphasis on military drill in police training, police incivility and excesses towards suspects and excessive use of imprisonment are still evident in the contemporary Zambian criminal justice system. Consequently, the system has alienated the people it is

designed to serve, some of whom have turned to unofficial or alternative means to deal with property crime.

1:3 Justification of the Study and of the Setting.

Both the police and court statistics show that property crime is the most prevalent type of crime both nation-wide and in Lusaka. The range of measures, both official and non-official, adopted to deal with property crime (to be discussed in chapter 8), indicate the extent of the seriousness of the problem. Yet, there has been no serious study to provide a detailed picture of property crime and the effectiveness of preventive measures.

The United Nations (Criminal Justice Branch) has called on member states (especially the newer ones) to examine their criminal justice systems with a view to introducing changes in light of their political, economic, social and cultural circumstances and traditions⁹. The U.N. call should be seen in light of the fact that the harmonious relationship between law and custom, taken for granted in many parts of the developed world, is largely absent in many former colonies. Zambia is no exception. This study therefore, hopes to provide some basis upon which the changes envisaged by the U.N. may be introduced. Indeed it is often the lack of even the basic descriptive information on the functioning of the Zambian criminal justice system which in a way impedes change.

As far back as 1963, Professor Read made an observation which is still valid to-day. He stated:

"Criminology in Africa is in an embryonic stage, in the past it has been one of the most neglected fields of research and

yet one of the potentially most fertile..."¹⁰.

Thus while other areas in both public and private law have previously been subjects of detailed research, criminal justice has been ignored. This study therefore tries to fill the existing gap in the growing local literature. It also contributes to the provision of much needed teaching material at the University of Zambia School of Law.

There are a number of factors which influenced the decision to restrict this study to Lusaka. Firstly, Lusaka, as will be shown below, provides an example of an African city in which the rate of urbanization and the transition from traditional to modern urban living has been quite rapid. It is of interest, however, that at the same time some cultural or traditional traits of the people such as inter-personal relationships and the extended family system continue to be features of urban living, thus providing a somewhat unique form of urbanization. This provides an interesting setting for this study and as chapter 5 will show, traditional forms of dispute settlement have survived urbanization.

Secondly, practical considerations and budgetary constraints made Lusaka more manageable to study. It presented fewer problems in terms of accessibility to sources of data, as it was the writer's home town. Extending this study to areas outside Lusaka would have presented accommodation and transport problems, resulting in the project being delayed considerably. Besides, the inclusion of other areas would have proliferated the number of variables in the analysis such as rural-urban differences. That would have

somewhat blurred the focus of the thesis. The major disadvantage of doing research in one's home area is probably that familiarity may lead one to ignore the importance of factors which an outsider might view differently. Careful planning and consultation, however, prevented that happening.

Thirdly and lastly, there is a growing emphasis in criminal justice and dispute settlement research on narrower and more sharply focused studies. The restriction of this study to Lusaka therefore follows this trend¹¹.

This study is restricted to magistrate's courts for at least two reasons. Firstly, these are the courts of first instance in criminal cases (despite the existence of Local Courts) and therefore handle the bulk of cases. Secondly, their decisions are not reported and therefore knowledge about how they operate is limited. This makes magistrate's courts attractive institutions to study.

The offences covered in this study are: theft, stock theft, theft by public servants, theft by servants, theft of a motor-vehicle, robbery, house breaking and burglary (see Appendix 1). These offences are studied in the context of the above stated theme and in the context of criminal process¹² defined in this thesis as:

The formal rules and practices through which the criminal justice system, i.e the police and the courts interact with the consumers of criminal justice, i.e victims/complainants, witnesses and defendants.

A word may be said about the limitations of data used in this

study as well as the limitations of the conclusions reached. Firstly, general members of the public were not interviewed. Views expressed in this study on the functioning of the criminal justice system were those of the actual victims or complainants in real cases as recorded by magistrates. These were supplemented by information gathered from a wide range of interviews of prisoners and police officers and questionnaires distributed to magistrates and legal practitioners as will be seen later in this chapter.

.....

Secondly, geographical confinement of this study to Lusaka means that generalisations of the results and most of the conclusions reached to cover the whole country may be misleading. Thirdly, in order to have a more comprehensive picture of the problems hampering the smooth administration of criminal justice in Zambia, there is need for further research. Such research should cover the Local Courts, the High Court and the Supreme Court. It should also address a wide range of offences including offences against the person.

1:4 Review of Literature.

As noted earlier, research into crime in Zambia has not received the same attention which other branches of law have received. There is, however, a sizeable amount of literature, although it mostly centres on the efforts of very few individuals. Most of these studies have either been too "wide" because they have covered all offences under the Penal Code and other laws or they have been too "narrow" being in article form. Besides, none of these studies has touched on the theme being developed here.

Further, most of the available literature tends to concentrate either on punishment as contained in the Penal Code or substantive criminal law rather than on the procedural issues or the criminal process.

One of the earliest studies was published by Clifford¹³ in 1960. This was a comparative study in which he examined criminal trends among Europeans in Northern Rhodesia and those in England and Wales.

.....

Between 1931 and 1958, reported crime among Europeans in Northern Rhodesia doubled from 185 to 370. During the same period, the European population increased fourfold. In 1931, one European in every 165 committed an offence against the person. By 1958, the proportion had fallen to one in every 1014 persons. Similarly, for property offences the rate had fallen from one in every 137 to one in every 265 people. But in England and Wales the figure had risen from one in every 637 in 1938 to one in every 376 in 1951 for all offences, thus giving the impression that Europeans in Northern Rhodesia were more law abiding than those in England and Wales. As Clifford himself admitted, such a comparison was flawed unless there existed a coincidence between those offences which were indictable in England and Wales and those contained in the Northern Rhodesian Penal Code¹⁴. Besides law enforcement and reporting patterns might have differed in the two territories.

Clifford then addressed himself to trends in criminality within Northern Rhodesia amongst four races: the Europeans, the Blacks,

the Asians and the Coloureds (mixed race). He discovered that between 1931 and 1958, crime by Blacks rose from one in every 807 to one in every 271. Among the Coloureds crime rose from one in every 843 to one in every 490. Among the Asians offences declined from one in every 64 to one in every 91¹⁵.

Clifford relied too much on police statistics. There was no effort to supplement police data with, say court records or interviews. His study, however, is useful to the present one at least in one sense. It provides evidence of the predominance of property offences among all reported crime from as far back as 1932. As seen above, the predominance of property crime on the one hand and the lack of information about its extent and the patterns it takes on the other are some of the reasons behind the decision to study this group of offences.

Three years later (1963), Clifford published another article¹⁶. This study was aimed at the investigation of the African conception of crime. The study which was conducted in Lusaka involved an opinion survey of 120 individuals, 70 of whom were of "good character" and 50 were "criminals". Results of this study, however, showed no difference in views between non-criminals and known criminals. The study found that murder, stealing, fighting, assault, adultery and rape were regarded as the most serious offences (in order of seriousness). It was of interest that adultery which is not a criminal offence was regarded as a serious offence. Equally of interest was the finding that insulting language was also ranked among the offences regarded as serious¹⁷.

The same study found mixed views about the police. Some respondents felt that the police were doing a "fine" job. Several people, however felt that the police acted with little civility and abused their power mainly due to their poor educational standard. A later study by the writer (to be considered below) as well as the present one seem to confirm the latter view. Another important finding by Clifford, which seems to be contradicted by a later study by the writer was that some of his respondents felt that offenders were being treated leniently. They therefore called for longer prison sentences and harsher prison conditions. This is a more relevant study to the present one, but it covered a narrower range of issues. The present study will, where appropriate, refer to its results either to confirm or to dispute them.

In 1969 Clifford published another article¹⁸. It discussed the development of the Zambian penal system, in particular, the prisons between 1924-1964. He highlighted the lack of a system for the proper classification of inmates. He then addressed himself to the penalties available under the Penal Code and called for an extension of probation service. He suggested the use of village headmen and chiefs (all rural based) and teachers as ad hoc probation officers. He, however, offered no formula on how that could work given the fact that crime in Zambia is really an urban phenomenon. He also suggested more use of fines and compensation orders especially against parents of young offenders. His call for wide use of what he terms "extra mural labour", officially called Extra Mural Penal Employment

(E.M.P.E.), is fully supported by this study. Similarly, his call for the training of criminal justice practitioners, i.e, probation officers is equally supported here. The present study calls for the extension of adequate training to cover police officers as well as magistrates. In both cases training should be more broadly based and should include refresher courses.

In 1984 and 1985 Hatchard published two articles. The 1984 article discussed the development of the Zambian Penal Code, its relation with customary law and its rules of interpretation¹⁹. He also analysed the incidence of crime in the country showing a steady increase in reported offences between 1967 and 1975. He attributed the rise in crime to an increase in urbanization. As will be seen later, Lusaka, for instance, has seen its population increase from 123,000 in 1963 to 450,000 in 1975. He then discussed the penalties available under the Zambian criminal justice system, after which he argued that there had been a shift over the years from the "short sharp shock" sentence to long sentences. Thus in 1965, about 23% of all sentences were for over six months but in 1977 over 62% of sentences were of that length. The main reason for this trend appears to be the sentencer's preference for deterrence²⁰, although the increase in the number of mandatory sentences especially after 1974 could also have been a factor. Hatchard also noted that the proportion of first offenders in prison had been rising. In 1964, 41% of all prisoners (nation-wide) were first offenders, rising to 63% in 1980.

The 1985 article mainly discussed the legislative, judicial and public response to crime in Zambia²¹. He traced the increase in

penalties for such offences as robbery, stock theft, theft of a motor-vehicle, and corruption and demonstrated that severe penalties did not significantly reduce the crime rate.

Hatchard then showed that the judicial response to crime was in the form of longer sentences and the tendency to imprison first offenders. He then turned to the public response and noted that wealthy people protected themselves by employing guards, building high walls around homes and business premises. On the other hand, the poor people protected themselves by attacking and beating alleged wrong doers or by "instant justice".

Hatchard ends this article with a plea for the greater use of non-custodial measures, particularly compensation and fines, as Clifford had done. The present writer, however, will argue that a wide-spread use of both compensation and fines may not be the best alternative to imprisonment, because property offenders are among the most disadvantaged members of society (see chapter 3) with no real assets which may be attached in the event of their failure to pay. Many of them would therefore end up in prison for failure to pay fines and compensation. Instead it is suggested in chapter 8 that E.M.P.E., combined with, say, a suspended sentence, could be a more appropriate alternative.

The two studies by Hatchard provide background material to the present study. The present study, however, goes further in many respects. Firstly, it covers a much broader public response to

property crime as it includes the neighbourhood watch and vigilante schemes, which are new institutions. It also examines the role of the police in crime prevention. As a crime prevention strategy, this study calls for collaboration between the criminal justice sector and the social services sector. Secondly, unlike Hatchard whose study depended mostly on police, prison statistics and decisions of the Appeal Courts (the High Court and the Supreme Court), this study has utilised wider and more varied sources of data. In particular it relies heavily on the unreported decisions of magistrates. Lastly, the present study, as already indicated, restricts itself to property offences in relation to the themes spelt out above.

In 1985, probably the only known victimisation survey in Zambia was published by the present writer²². It utilised a questionnaire which was distributed to a cross-section of the public, selected randomly mainly in Lusaka and the Copperbelt. The questionnaire was designed to elicit information on (inter-alia) the extent of victimization in relation to property crime, the reporting of such offences and the factors which contributed to property crime, with the aim of making suggestions on how best to curb those offences. Most of the results of this survey will be discussed where appropriate in this study, especially in relation to crime prevention (chapter 8). But it may be useful to mention some results here.

In the entire sample, 68.75% of the subjects said that they had been victims of property crime in the last 12 months. On the question of the prevention of property crime, the writer argued

that the profitability or the attractiveness of those offences on the one hand and the poor detection methods on the other had somewhat rendered severe penalties ineffective. The article concluded with a call for more supplementary measures (both deterrent and preventive) such as more police visibility, to control property crime.

Like Hatchard's work, this article provides background material to the present study. Although the victimisation survey and the present study focus on the same type of crime, they address a different set of questions and pursue different aims. The two studies, however, supplement each other in the sense that they both throw light, but from different angles, on the way the criminal justice system functions, particularly in the urban areas of Zambia.

A year later (1986) the present writer published another article. It briefly examined the indigenous criminal law (all crimes)²³ that existed at the beginning of colonial rule and how the colonial power reacted to it. The reaction to indigenous criminal law was examined in the context of the "repugnancy doctrine", the test that was devised to assess the applicability of African law. The article then discussed the current criminal law in Zambia and speculated on the justification for the continued disregard of customary criminal law. It concluded with a call for an in-depth study of customary criminal law with a view to integrating some of it into the current criminal law. This is the only way in which the current criminal law can become more broadly based and more acceptable.

This article, unlike the present study, did not address itself to procedural matters, but confined itself to substantive criminal law. Thus issues such as the pre-trial and trial procedures, sentencing and crime prevention were not covered. The present study will, however, rely to some extent on this article for part of the discussion in chapter 2.

The most recent work is that by Clegg, Harding and Whetton²⁴. This was a comparative study of Kenya and Zambia. The study had several objectives. These were to analyse published or recorded crime and criminal justice systems in both countries since independence, to examine the decision-making process in magistrates' courts and to assess the potential for alternative policies. In Zambia, research (i.e, court observation and interviews of magistrates) was conducted in Lusaka and Kitwe between January and April, 1987.

This study noted the high use of remand in custody. In 1985, 72% of all prison admissions and 36% of the daily average population nation-wide were remands. Court observation revealed that around 50% of those appearing in court for all offences under the Penal Code and other laws were on remand in custody at the time of appearance. The majority of them (around 65%) were either not convicted or if convicted, they were not sentenced to imprisonment.

Other results were that 54% of the cases ended in conviction of which 64.7% resulted in sentence of imprisonment. The study also showed that 37.3% of the cases were withdrawn, 7.2% ended in the acquittal of defendants and 1.2% ended in reconciliation.

Clegg and his fellow researchers identified the lack of witnesses and the (pre-existing) relationship between the complainant and the defendant as the major reasons behind the withdrawal of cases.

The present study goes further. Firstly, it provides a wider range of reasons behind the withdrawal of cases by both the police and complainants. Secondly, it provides a deeper insight into the question of withdrawal of cases as the matter is discussed in the context of one group of offences. Thirdly, Clegg, Harding and Whetton note in their conclusion that future studies should probably start with the police because inter alia,: "...their discretionary behaviour is so crucial in shaping the nature of received justice"²⁵. In a sense, the present study attempts to supplement theirs and tries to fill this gap as it throws light on the nature of the police-suspect encounter and its implications on police-public relations. Besides, there are other questions such as sentencing and crime prevention which were not fully covered by Clegg, Harding and Whetton, but they are here.

In addition to the above mentioned studies, there are others, conducted elsewhere, which will be mentioned in appropriate chapters as comparative material²⁶.

1:5 Methodology (Sources of Data).

Much of the data for this study was collected during field work in Lusaka between July-December 1989. The following were the sources of data: Documentary sources i.e case records and Annual

Reports of the police, the judiciary and the prisons department, interviews conducted with offenders, police and prison officers and a former Director of Public Prosecutions (D.P.P) and questionnaires distributed among magistrates and practising lawyers.

1:5 (a) Documentary Sources.

(i) Case Records.

Case records contained in the Form S.C. Criminal No. 35 were obtained for the period between 1982 up to the first half of 1989. We were able to locate a total of 850 cases from the two court sites, representing a total of 1129 defendants. The initial plan was to get records for a 4 month sample of each of the years in the period mentioned above. But after a pilot survey, it became clear that it would be impossible to get an even number of cases from each sample due to poor record keeping. It also became evident that it would be easier to obtain records for later years than for earlier ones. Thus whilst only 65 cases were available for 1982, 210 cases were located for the first half of 1989.

Case records provided information on the background characteristics of offenders, (age, sex, residence, employment), bail and remand practice, the charge, type, quantity and value of property stolen, language spoken by the defendant in court, the plea, judgment, statement in mitigation of sentence, and in a few cases, the reason for sentence. Case records also provided a wide range of information on the withdrawn and dismissed cases and on those which ended in the acquittal of defendants. In addition they contained a brief summary of the

facts of the case as recorded by the magistrate in long hand. All this information was extracted from case records onto a specially designed form which closely resembled the official Form S.C.Criminal No. 35, (see Appendix 2). Data from case records were analysed both manually and by computer.

The initial plan was to locate case records by using case registers for selected years. When these could not be easily found, it was decided to collect all available records for the period mentioned above. Case records therefore represented a 100% sample. It has been pointed out that a large sample provides a safe ground for generalizations and accuracy of results²⁷. There is, however, no means of knowing what the missing records contained. In other words, there is no way in which it can be ascertained that the missing records do not contain cases which are peculiar in one way or another, such as having one court disposal being over-represented or under-represented. On the other hand, there is no reason to believe that the missing records distort the conclusions reached in any significant way. On the contrary, case records tend to be in line with police statistics on a number of aspects such as sentence length, as will be seen in chapter 8. They also tend to be in line with the findings of Clegg, Harding and Whetton especially on the question of court disposals, as will be seen in chapter 5.

(ii) Annual Reports.

Annual Reports of the police, prisons and the judiciary were acquired where available for the years 1964-1988. The Zambia Police Annual Reports contain statistical data on the number of

cases "dealt with" by the police, (i.e recorded by them) on Z.P Form 85 and the number of persons "dealt with" by the courts on Z.P Form 85(a). The Annual Reports by the Judiciary (formerly known as Annual Reports of the Judiciary and the Magistracy) contain statistics on the persons "dealt with" by the magistrates on Form S.C. Criminal No. 36. The S.C.Criminal No. 36 is equivalent to the police's own Z.P. 85(a). There is, however, one major difference between the two sets of data which makes cross-checks and comparison difficult. While Z.P Form 85(a) breaks down offences into 8 divisions in accordance with the Penal code classification, the S.C Criminal No. 36 breaks down the same offences into 4 categories only.

In addition to the above, raw statistics were collected from the Police Force Headquarters in Lusaka. These contained cases "dealt with" by or reported to the police and persons "dealt with" by courts in Lusaka between 1978 and 1990. These statistics were not included in the Police Annual Reports as separate data, because those reports only provide data on a nation-wide basis. Both the police and judiciary statistics were analysed manually. These data were used to analyse sentencing patterns and to test the effectiveness of deterrent legislation in crime prevention. They were also used as comparative material, i.e they were used for comparison with information extracted from case records.

Reported offences, however, constitute only a fraction of the total crime committed both nation-wide and in Lusaka. There are a number of reasons that inhibit victims/witnesses from reporting

offences. The victimization survey already referred to revealed that the main reason for the victim's reluctance to report offences was his belief that the police would not apprehend the offender²⁸. As has been noted in other studies elsewhere, the distance between the victim/witness and the nearest Police Station affects the rate of reporting²⁹. An additional factor in Lusaka and nation-wide is the lack of communication facilities. Public telephones (which once existed) are no longer available and very few homes have telephones.

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As will be seen later in this thesis (chapter 5), the victims's reservations about certain court procedures and the remedies available mean that a sizeable number of offences are dealt with between the parties themselves and do not get to the attention of the police. It is also common knowledge that a number of thefts at places of work are dealt with administratively and are not reflected in police records.

The problem is how to gauge the "dark figure" or the unreported crime. A self-report study which was intended to be part of the victimization survey mentioned above and which could have thrown some light on this problem was met with apathy from all the respondents³⁰. The victimization survey, however, revealed that only 12% of the victims of property crime failed to report offences. But in the absence of a self-report survey, the full extent of unreported property crime is unknown.

The Prisons Department Annual Reports contain statistical information relating to the prison population. This information

include the overall inmate population, the number of inmates on remand as well as figures on recidivism. The major shortcoming with these data is that they are not broken down into offence categories nor are they broken down into regions.

1:5 (b) Interviews and Questionnaires.

(i) Offenders.

At the beginning of interviews of offenders, (August 7th 1989), there were 496 inmates in Lusaka Central Prison. Their distribution was as follows:

(i)	Remanded in custody awaiting trial.....	284
(ii)	Prohibited immigrants.....	17
(iii)	Detained under Presidential powers.....	16
(iv)	Convicted offenders.....	179
	Total.....	496

Of the 179 convicted offenders, 138 had been convicted for various property offences, 8 of whom were interviewed in a pilot survey. In the main survey, 100 offenders were interviewed, representing a 72% sample.

The selection of offenders for interviews was influenced by the distribution of the 138 offenders per offence category. In other words, the sample of 100 offenders closely resembled the distribution of the 138 offenders per offence category as Table 1 shows:

TABLE 1 DISTRIBUTION OF PROPERTY OFFENDERS PER OFFENCE CATEGORY
IN LUSAKA CENTRAL PRISON AS AT 7th. AUGUST, 1989.

Offence category.	No. of offenders in Lusaka Central Prison as at 7th August 1989.	No. and % of offenders selected for interviews.
	No.	%
1 Theft (from person, motor -vehicle).....	24	17
2 Theft by Servants.....	38	28
3 Theft by Public Servants...	7	5
4 Stock Theft.....	7	5
5 Theft of a motor-vehicle...	8	6
6 Robbery.....	5	4
7 Aggravated Robbery.....	6	4
8 Burglary.....	28	20
9 House Breaking.....	15	11
Total.....	138	100

The next step was to draw 9 different lists of offence categories showing the number and the names of offenders under each category. All the names of offenders per offence category were written out on different pieces of paper, folded and put in a box from which the required number of offenders to be interviewed was drawn³¹. This process was repeated for each offence category.

It can be seen from Table 1 that in some cases, especially serious offences, the percentage of offenders selected for interviews was slightly higher than the actual percentage of imprisoned offenders. The reason for this is that we wanted to

have a reasonable number of offenders per offence category in order to make a meaningful analysis. Further, as some analysis will entail a comparison of serious with non-serious offenders and examination of variations and similarities within the groups on a variety of variables, it was desirable to have the same number of serious and non-serious offenders. Our sample of 100 offenders from the two groups was distributed as follows:

(i) Non-serious Offenders

Theft (from the person etc)....17%
Theft by Servants.....28%
Theft by Public Servants.....5%

Total.....50%

(ii) More Serious Offenders.

Stock Theft.....5%
Theft of Motor-vehicle.....5%
Robbery.....5%
Aggravated Robbery.....5%
Burglary.....20%
House Breaking.....10%

Total.....50%

(Since the number of offenders interviewed was 100, percentages in all cases represent the actual number of offenders).

Interviews were very detailed, lasting between 3-5 hours and it was possible to interview only one offender per day. Offenders were asked to relate freely their life histories from the time of birth up to the time of the interview (See Appendix 3). We were able to record detailed information relating to childhood experiences, education and employment records, first contact with the police, offences committed previously and the result (i.e, whether they were apprehended, charged, tried and including judgment passed and the sentence imposed, if any). Interviews also revealed how and why the offences were committed, how the

police came to know about them and how the offenders were treated as suspects at the Police Station. In addition, interviews revealed how offenders disposed of the stolen property, their perception of risk, criminal justice, particularly procedural matters, (including reasons for the plea tendered) and their views on rehabilitation programmes.

There may be a problem of representativeness of the sample due to the nature of prison administration and therefore a matter beyond the control of the writer. Every 3-4 months offenders are transferred from the Lusaka Central Prison to open-air prisons across the country. Most offenders who were in the prison throughout the period of interviews were mostly the newly admitted ones awaiting transfer. Others were those found unsuitable for open-air prisons (and for farm work) because they were sickly or because they posed a high escape risk. Yet others were those who did not qualify under the rules covering transfers as will be discussed in chapter 8. Similarly, those convicted of aggravated robbery are normally transferred to the maximum security prison in Kabwe where execution facilities exist. Most aggravated robbery offenders interviewed had been brought to Lusaka to hear their appeals in the Supreme Court.

But there seems to be no reason to suspect that the sample was biased in any significant way. On the contrary, a number of important aspects of this sample, such as the background characteristics as well as the sentence length, seem to be in line with the offender sample from case records.

The use of prisoners as a representative sample of offenders in any community has been criticised³². The basis for this criticism is the possible bias in law enforcement as well as the large number of offences which are not reported or not detected. As already seen above, a past effort by the writer at a self-report survey, which could have supplemented the offender data proved fruitless.

This study does not claim that the prisoners interviewed are a sample of criminals. Rather, our offender sample presents a profile of imprisoned offenders in Lusaka. It may also be mentioned that despite the above criticism, imprisoned offenders continue to be a subject of research, which in some respects may be an indication of their usefulness³³. It seems that the difficulties inherent in mounting self-report studies make offenders an attractive subject of study. In this study, the method adopted, i.e extracting life histories from offenders rather than their mere characteristics, provided a unique and vivid insight into the nature of property crime which no statistics or victimization surveys are able to do. Thus we were able through the analysis of offender interviews, to formulate quantitative data from the qualitative material as will be seen in chapter 4.

In addition to imprisoned offenders, 8 individuals who included 5 offenders (two of whom were given a suspended sentence and three had their cases withdrawn) and 3 complainants were interviewed at one of the two court sites. The initial plan was to interview at least 20 offenders given a non-custodial sentence

and 20 complainants and offenders whose cases were withdrawn. The life histories of the 20 offenders were to be compared with those of the imprisoned offenders. On the other hand, the 20 complainants and offenders whose cases were withdrawn would have thrown more light on the withdraw of cases. The realities of the situation, however, frustrated this part of field work. It proved very difficult to get subjects (especially the offenders) to be interviewed as their normal reaction was to rush out of court and head for home or for the safe haven of waiting relatives. This was quite understandable as many of those offenders had been remanded in custody. The other problem was that it was rare for magistrates to impose non-custodial sentences in respect of property offenders as chapters 6 and 7 will show. Further, the atmosphere at the courts was not conducive for interviews as there were no suitable premises for the exercise. It was quite difficult to get the 8 individuals to talk outside the court room and in full view of the public. The interviews of the 8 individuals were not included in the analysis as the sample was too small to carry any significance. The exclusion of this material does not create a serious gap in the data since other sources, especially magistrates, police officers as well as case records, provided most of the required information.

(ii) Police and Prison Officers.

There are 7 main Police Stations in Lusaka, 4 of which were visited. During the visits, discussions were held with senior detectives and investigation officers at each station. The main purpose of the visits was to get general views on the treatment

of suspects in police custody as a means of verifying some of the allegations made against officers by some of the interviewed offenders. Discussions also threw light on police manpower and other problems of resources.

During discussions, care was taken so as not to incriminate any police officers (some of whom were named by offenders) nor to name any offenders involved, nor any specific instances of alleged police excesses. The discussions revealed the illegal means the police used and how they used them in order to extract confessions. They also revealed the type of offenders and the offences for which the means in question were most likely to be employed.

In addition to the 4 senior detectives and investigation officers, we also had an interview with the Assistant Commissioner of Police in charge of police prosecutions and a former Director of Public Prosecutions (D.P.P). These two interviews which were carried out on different occasions, covered a wide range of issues including police training, supervision and accountability, prosecution policy, the process of decision making to prosecute a property offender, problems of prosecuting a property offender and case withdrawals.

Three prison officers, who were involved in rehabilitative schemes in Lusaka Central Prison were interviewed. The interviews took place after a conducted tour of the carpentry and tailoring workshops inside the prison. The tour and interviews revealed details of the rehabilitation programme, problems and prospects.

(iii) Magistrates.

There were 12 magistrates at both court sites at the time of field work, 9 of whom were contacted by a questionnaire (see Appendix 4). Five of them were "lay" and 4 were "professional"³⁴ magistrates. The purpose of the questionnaire which was distributed to a randomly selected group of magistrates was to get their views on a wide range of issues including: the minimum sentences, the imprisonment of first offenders, the use of non-custodial measures such as E.M.P.E, the plea, trial procedures and other related matters. We also wanted to find out whether their views on the above matters were in any way influenced by their being "lay" or "professional", but the number of magistrates in either group was too small for a meaningful comparison.

(iv) Practising Lawyers

Six leading practitioners both in private practice and at the Attorney General's Chambers were contacted by a questionnaire (see Appendix 5). They were all selected on the basis of their experience and the offices they held at the time of field work. Three of them had 15 years standing at the Bar each, one of whom was the then chairman of the Law Association of Zambia. Two of them had between 10-15 years experience and the last one, who was the Chief Parliamentary Draftsman, had a total of 19 years of prosecution experience behind him.

The main reason for soliciting their views was to verify some of the allegations made by interviewed offenders against the police in relation to the methods of interrogation and extracting confessions. The views of legal practitioners also threw light on the validity of allegations made by offenders against the

administration of justice in the magistrate's courts, in particular, with regard to procedural matters.

1:6 The Setting

1:6 (a) Brief History of Lusaka.

Lusaka was founded in 1905 as a railway siding during the construction of the railway line from the southern to the northern part of the country. The name "Lusaka" came from a local village headman³⁵.

Development was quite rapid and by 1913, Lusaka had already received township status. Following the amalgamation of North-Eastern and North-Western Rhodesia in 1911, moves began to be made by 1913 to transfer the territorial capital from Livingstone on the southern border to Lusaka. The other consideration for moving the capital city was the central nature of Lusaka in relation to the whole country and the need for the capital city to be near the Copperbelt, the industrial base of the country. So in 1935, Lusaka became the nation's capital city.

1:6 (b) Population

The first population data on record is for 1931, which was 2,433, rising to 19,000 in 1946. The population annual growth was then 15%, but which increased to 19% between 1946 and 1951. The annual growth rate dropped to 13% in the 1950s and dropped even further in the 1960s to 6%. The drop between 1953-1963 could at least partly be explained in terms of the Federation of Rhodesia and

Nyasaland which removed some of governmental activities from Lusaka to the Federal capital, Salisbury (now Harare). But after the dissolution of the Federation in 1963 the population of Lusaka started to grow again. Thus by 1969, it had reached 262,000³⁶.

Lusaka's population has grown at a more rapid rate than the national population. Thus between 1963-1968, the national population growth rate was only 2.6% whilst that of Lusaka was 13%. Between 1969-1980, the annual growth rate for Lusaka was 7% and it was 5% between 1980-1990, as compared with national growth rate of 3.6% and 3.7% respectively³⁷. Table 2 below illustrates the current population and projections for Lusaka:

TABLE 2 DISTRIBUTION OF LUSAKA POPULATION BY AGE AND SEX 1980-2000.

<u>YEAR</u>	<u>AGE & SEX</u>						<u>TOTAL.</u>
	<u>0-15 YEARS</u>		<u>16-35 YEARS</u>		<u>35-65+ YEARS</u>		
	<u>M</u>	<u>F</u>	<u>M</u>	<u>F</u>	<u>M</u>		
1980	135,117	139,897	90,683	90,084	47,944	32,045	535,779
1985	167,208	186,734	121,606	120,244	64,292	42,774	702,858
1990	246,370	252,570	165,277	162,645	87,382	57,857	971,701
2000	449,662	456,090	301,658	293,698	159,482	101,478	1765068

SOURCE: New Economic Recovery Programme, 4th National Development Plan 1989-1993, 656.

Population growth in Lusaka has been due to two factors: natural increase and migration. The natural increase is largely attributable to the relatively good access to health facilities in Lusaka compared with other areas, especially the rural areas. This has inevitably reduced the death rate and increased the birth rate.

In terms of migration, figures show that between 1963-1969, there was an annual net flow of almost 20,000 people into Lusaka, accounting for 10% of the city's population at that time. In the early 1970s, there was an annual in-flow of 23,000 people, but that figure fell to only 4,000 people or about 1% of the population especially after 1974³⁸. In contrast, the rate of natural population increase kept rising. Between 1963-1969, it was 2.5%, rising to 2.9% between 1969-1974 and to 3.3% after 1974³⁹.

Most migrants to Lusaka come from the Eastern Province of the country, the main reason being that the language of that Province is more widely spoken in Lusaka than any of the other Zambian languages. Thus between 1969-1980 about 37% of all migrants came from that Province, the Northern and Southern Provinces contributing 13% and 12% as the second and third highest respectively⁴⁰.

The contribution of immigration to the Lusaka population should also be noted. In 1969, 29,551 people or 16% of the population were born outside Zambia. That figure rose up to 38,370 in 1980, but represented only 7.2% of the total population due to the overall population increase. The only available figures show that in 1969, 62% of the Lusaka population was African, 17% European, and 5.2% Asian. The major sources of international population in terms of countries were Zimbabwe, Malawi and the United Kingdom⁴¹

1:6 (c) Residential Pattern.

Figure 1 shows that Lusaka has four different types of residential areas. It also shows the proportional land mass of

each residential area (in percentages) and the percentage of the population it contains. It can be seen, for instance, that the high cost area consists of 55% of the total Lusaka land mass, but contains only 16% of its population. On the other hand, the squatter and upgraded squatter areas consist of 20% of the total land mass, but provide accommodation for 48% of the population.

The characteristics of the Lusaka population vary in accordance with the residential areas. Most people living in high cost areas are likely to be professionals such as lawyers, doctors as well as politicians, top civil servants, businessmen and parastatal company executives. Some of the housing in high cost areas is owned by occupiers while some of it is tied to employment and therefore owned by the employer. A typical house in these areas, is likely to be heavily barred against burglars and to have a wall fence topped with barbed wire, heavy spikes or broken glass stuck in cement. Most houses have a watch-man employed by the occupier or his employer either on a 24 hour basis or during the night.

In contrast, most squatter and upgraded squatter areas accommodate the unemployed and marginally employed. Residents of these areas who are in regular employment are mostly street cleaners, garbage collectors and house servants. Others may be low level office workers such as office orderlies, clerks as well as shop attendants. A large number of market and petty traders also live there⁴². Housing in those areas is poor so is sanitation. Water supply is mostly communal, electricity is not generally available and the areas are insecure.

The proportion of high cost areas has decreased over the years while that of squatter and upgraded squatter areas has increased. Thus in 1969 for example, the high cost areas accounted for 61% of the total land mass whilst the squatter and upgraded squatter areas accounted for only 7%⁴³. As we have already seen the proportion of the former areas has decreased to 55% whilst that of the latter areas has increased to 20%. Squatter population has also increased. In 1969, it contributed only 15% to the total Lusaka population, rising to 45% in 1973⁴⁴. As seen above, by 1989 the squatter and upgraded squatter population had risen to 48%. There are three main reasons why squatter and upgraded squatter areas are expanding. Firstly, low income levels relative to rent or the lack of it drives people into those areas. Secondly, the policy (which began in the then Northern Rhodesia) of tying most housing to employment means that eviction follows the loss of employment⁴⁵. Many of the affected employees seek shelter in squatter areas, first on temporary basis and later becoming permanent if no suitable alternative is found. Thirdly, squatter areas provide a suitable environment for economic security and inter-dependence. As will be seen below, the extended family system still flourishes in Lusaka as a source of support especially among the poor. Unauthorised housing or squatter areas offer a greater possibility for personal decision as to who should be one's neighbour than officially approved housing⁴⁶. Thus it is common in squatter and upgraded squatter areas to find a cluster of houses belonging to people who are related in one way or another to each other.

1:6 (d) Education and Employment.

At a glance, Lusaka seems to be well catered for in terms of educational facilities. It is the home of the University of Zambia, until 1982, the country's only university. In addition, it has 3 big colleges, a Trades School, some 9 secondary schools and several privately run secondary schools and colleges. A more careful look, however, suggests that Lusaka has been unable to provide school places for every eligible child especially at the secondary school level⁴⁷. In 1984 for example, the total national enrolment in senior secondary schools was 125,811 out of 6,374 or 5% were enrolled in Lusaka. In 1988, the national enrolment figure was 144,108 out of which 12,330 or 8% were enrolled in Lusaka based schools. During the above periods, Lusaka's proportion of the national population was an average of 11-13%⁴⁸

Lusaka's industrial activities include manufacturing, construction and services. A 1969 study estimated that there were 139,792 economically active individuals out of a total population of 262,000 of whom 55% were male and 45% were female. The same study found that 88% of the male workers were in paid employment and 8% in self-employment and 4% in unpaid family business. The corresponding figures for females were 58%, 10% and 32% respectively⁴⁹. Unemployment seems to be more rife among the young male population. A 1979 study which analysed details of ages of the unemployed people in Chawama, an upgraded squatter area in Lusaka showed that a male person under the age of 25 years was five times more likely to be unemployed than older

eligible workers⁵⁰.

A more recent study has shown that 42% of the labour force in Lusaka are involved in the informal sector, defined as: "petty commodity activities ranging from trading in mealie-meal to selling cigarettes singly and vegetable hawking"⁵¹. That study also noted that prospects in this sector were shrinking. Real incomes of traders were declining rapidly forcing them to depend on relatives to survive.

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1:6 (e) Social Structure

Epstein's study on the Copperbelt region of the country, demonstrated that kinship and extended family systems were the basis for social organization in Zambian urban areas⁵². Lusaka is no exception.

The extended family system entails a variety of obligations. Cousins, nephews, nieces, uncles, brothers, sisters etc, are ordinarily expected to provide shelter and financial assistance to each other. It is hard to imagine a home in Lusaka today which does not have at least one extended family member living there permanently⁵³ and as a matter of "right". A man is therefore expected to look after and educate his nephews, nieces, sisters, brothers, cousins, brothers-in-law etc, in addition to his own children⁵⁴. All such help is generally regarded as an investment and there is an expectation that an individual assisted now will reciprocate in future or help other needy relatives.

In some respect the extended family system mitigates the harsh

realities of urban life especially among the poor, who often have to depend on each other to survive. On the other hand, the same realities of urban life have in a way weakened the extended family system. The young professionals and other well-to-do relatives have now narrowed down their obligations to the elementary family in the Western sense of husband, wife and children as their financial commitments expand (such as mortgages). This has led to a situation in which the poorer members of the extended family accuse the well-to-do members of neglect. In turn they counter accuse them of being unrealistic and old fashioned.⁵⁵

Notes.

- 1 See for instance, A.Roberts, A History of Zambia, London, 1976 and R. Hall, Zambia, London, 1965.
- 2 See for instance, W.Tordoff (ed), Politics in Zambia, Manchester, 1979 and K.Osei-Hwedie and M.Ndulo (eds), Issues in Zambian Development, Roxbury, (USA), 1985.
- 3 The countries are: Zaire on the North and North-West, Tanzania on the North and North-East, Malawi on the East, Zimbabwe on the South, Botswana and Namibia on the South-East, Mozambique and Angola on the South-East and West respectively.
- 4 R.Hall, op cit, 94 and M.M Burdette, Zambia Between Two Worlds, Boulder, (Colorado), 1988, 7.
- 5 M.Ndulo, "Planning in Zambia: An Analysis of the Third Five Year Plan", in H.O.Hwedie and M.Ndulo (eds), op cit, 1985, 19.
- 6 M.M.Burdette, op cit, 43.
- 7 J.Clark and C.Allison, Zambia: Debt and Poverty, (Oxfam), Oxford, 1989, 23.
- 8 A.N.Allott, "Dualism in Courts and Law in Africa: An Overview", in The Report on the African Commonwealth Magistrates's Seminar on Legal Education for Magistrates, Local, Primary and Customary Courts and the Future of Customary Law, held in Lusaka, 27th July-2nd August, 1980, 35.
- 9 See the United Nations General Assembly Resolutions 37/171 of the 15th. December 1980, and 36/21 of the 19th. December 1981. See also United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI), "Report of the Seminar on Planning for Crime Prevention and Criminal Justice in the Context of Development" Addis Ababa, Ethiopia, 3-12 June 1987, United Nations Economic Commission for Africa 14.
- 10 J.S.Read, "Criminal Law in Africa of Today and Tomorrow", [1963] J.A.L., 7.
- 11 Within Zambia, this study contributes to the growing body of research in the general area of dispute settlement, but in very specific settings. Some earlier studies are: S.R.Canter, "Law and Local Level Authority in Zambia", Ph.D Thesis, University of Michigan, 1976. This was a study in Chief Mungule's areas in Lusaka rural; R.C Cutshall, "Disputing for Power: Elites and the Law Among the Ila of Zambia" Ph.D Thesis, University of Michigan, 1980 and C.N.Himonga, "Family Property Disputes: The Predicament of Women and Children in a Zambian Urban Community" Ph.D Thesis, University of London, 1985. The focus of this study was Lusaka. Elsewhere, sharply focussed studies include M.B.Clinard and D.J.Abbott, Crime in Developing Countries, New York, 1973 (a study in Kampala) : J.Baldwin and A.E.Bottoms, The Urban

Criminal, A Study in Sheffield, London, 1976 : E.Muga, Crime in a Kenyan Town, A Study of Kisumu, Nairobi, 1977.

12 Criminal process differs little from criminal procedure. Thus some writers have treated them as one. See, for instance, L.L.Weinreb, Criminal Process, Mineola, New York, 1978, who discusses investigation, arrest, questioning, charge, bail, decision to prosecute, trial, sentencing, appeals, etc. Other writers such as D.M.Walker have, however, defined criminal procedure differently. He defines it as: "The body of rules representing the steps to be gone through for the determination of the liability of a person to the sanctions of the criminal law for the alleged conduct on his part. The rules must seek to maintain public order and repress crime, with the need to give fair protection and fair trial to the person accused. See The Oxford Companion to Law, Oxford, 1980, 318.

13 W.Clifford, "Crime in Northern Rhodesia", The Rhodes-Livingstone Institute, Communication No. 18, Lusaka, 1960.

14 Op cit, 35.

15 Ibid, 37.

16 W.Clifford, "The African View of Crime" Brit.Jo.Crim, 4, 477. (1963-1964).

17 Ibid, 478.

18 W.Clifford, "Zambia" in A.Milner (ed) African Penal Systems, London, 1969, 237.

19 J.Hatchard, "Crime and Punishment in Zambia", M.Ndulo (ed) Law in Zambia, Nairobi, 1984, 163. Earlier (1982) Hatchard had produced "Readings in Criminal Law and Penology" (mimeograph) in which he discussed the development of the Zambian Penal Code, defences to criminal liability: defence of person and property, intoxication and provocation. He also examined the Zambian Penal System and principles of sentencing as established by the Appeal Courts, i.e the High Court and the Supreme Court.

20 Ibid, 171.

21 J. Hatchard, "Crime and Penal Policy in Zambia", The Journal of Modern African Studies, 23; 3 (1985) 483.

22 K.T.Mwansa, "A Survey of Property Crime in Zambia" in H.O Hwedie and M.Ndulo (eds), 1985, op cit, 321.

23 K.T.Mwansa, "The Status of African Customary Criminal Law and Justice under the Received English Law in Zambia: A Case for the Integration of the Two Systems" Zimbabwe Law Review, 4, 23. (1986).

There are other publications which may also be mentioned but whose common criticism is the narrowness of the questions they

have addressed. These are: K.T Mwansa, "Aggravated Robbery and the Death Penalty in Zambia: An Examination of the Penal Code Amendment Act (No.2) of 1974" Zambia Law Journal, 16, 69. The aim of this article was to show the ineffectiveness of the death penalty and to incite debate on it with a view to its abolition; R.S. Canter, "Dispute Settlement and Dispute Processing in Zambia: Individual Choice Versus Societal Constraints" in L.Nader and H.F.Todd (eds) The Disputing Process-Law in Ten Societies, New York 1978, 247. This article discusses the factors which influence litigants among the Lenje people of the Southern Province of Zambia, to choose a forum for dispute settlement out of the many available remedy agencies; C.R.Cutshall, "Culprits, Culpability and Crime: Stock Theft and other Cattle Maneuvers Among the Ila of Zambia" African Studies Review, Vol XXV, 1982, 1. This article examines stock theft and responses to it within the wider context of cattle manouevering among the Ila of Zambia, M.Ndulo, "Punishment as a Technique of Control" ZANGO, Zambian Journal of Contemporary Issues, 3rd. August 1977, 33. In this article Ndulo discusses the purpose of punishment by examining its three traditional justifications namely: deterrence, rehabilitation and retribution and F.O. Spalding, E.L.Hoover and J.C.Piper, "One Nation, One Judiciary: The Lower Courts of Zambia", 2 Zambia Law Journal, 1. This article discusses the local and subordinate courts in Zambia. It lays emphasis on the structure of these courts, their jurisdictions and the personnel who preside over them.

24 I.Clegg, P.Harding and J.Whetton "Comparative Study of Judicial Process in Magistrate's Courts in Kenya and Zambia" paper presented at the British Criminology Conference, Centre for Criminal Justice, Bristol Polytechnic, 17th-20th July 1989.

25 Ibid, 26.

26 These studies include those mentioned in note 32.

27 See P.J.Pelto and P.J.Pelto, Anthropological Research: The Structure of Inquiry, London, 1978, 137.

28 K.T.Mwansa, op cit, 1985, 325.

29 See, for instance, R.E.Tanner, Three Studies in East African Criminology, Uppsala, 1970. People who live in Kalundu, a Lusaka suburb, for instance, fall under Chelston Police Station situated some 15km. away. Victims from that area have to travel the distance to make a report.

30 In the pilot survey, all the respondents ignored the self-report section of the questionnaire. Some of the questions from that section were: "Have you in the last 12 months taken someone else's property without his permission or dealt with it in such a way that the police ought to have known about it?", "If the answer is 'yes', did the police know about it?", "Were you questioned and/or arrested by the police?", "Were you charged, prosecuted, acquitted, convicted, sentenced?", "What type of

sentence was imposed?. The self-report section was therefore not included in the final questionnaire.

31 This method is known as "stratified random sampling". See P.J.Pelto and P.J.Pelto, op cit, 133. See also M.Peil, Social Science Research Methods, An African Handbook, London, 1985, 36-38, and C.Bless and P.Achola, Fundamentals of Social Research Methods, Lusaka, 1988, 66-68.

32 See for instance, C.Sumner, "Crime, Justice and Underdevelopment: Beyond the Modernisation Approach", in C.Sumner (ed), Crime, Justice and Underdevelopment, London, 1982, 15.

33 There are a number of published works whose material was partly or wholly derived from imprisoned offenders. See for instance, E.Muga, Crime and Delinquency in Kenya, Nairobi, 1975, Robbery With Violence, Nairobi, 1980. and his Crime in a Kenyan Town op cit; S.Ekpenyong, "Social Inequality, Collusion and Armed Robbery in Nigerian Cities", Brit.Jo.Crim, 29, 21 (1989); C.Birkbeck, "Property Crime and the Poor: Some Evidence from Cali, Columbia", in C.Sumner (ed), op cit, 162; M.B.Clinard and D.J.Abbott, Crime in Developing Countries, op cit; J.Gunn and J.Cristwood, "Twenty-Seven Robbers", Brit.Jo.Crim, 16, 56 (1976); A.W.Griffiths and A.T.Rundle, "A Survey of Male Prisoners", Brit.Jo.Crim, 16, 352 (1976); and J.Baldwin and E.A.Bottoms, The Urban Criminal: A Study in Sheffield, op cit.

34 This classification of magistrates is explained fully in chapter 2.

35 R.Simpson, So This Was Lusaakas: The Story of the Capital of Zambia, Lusaka, 1982, 12-13. See also G.J.Williams, "The Early Years of the Township" in G.J.Williams (ed) Lusaka and Its Environs, Lusaka, 1986, 27.

36 A.P.Wood, "The Population of Lusaka" in G.J.Williams (ed), ibid, 164.

37 New Economic Recovery Programme, Fourth National Development Plan 1989-1993, Vol.II, National Commission for Development Planning, Lusaka, 1989, 654.

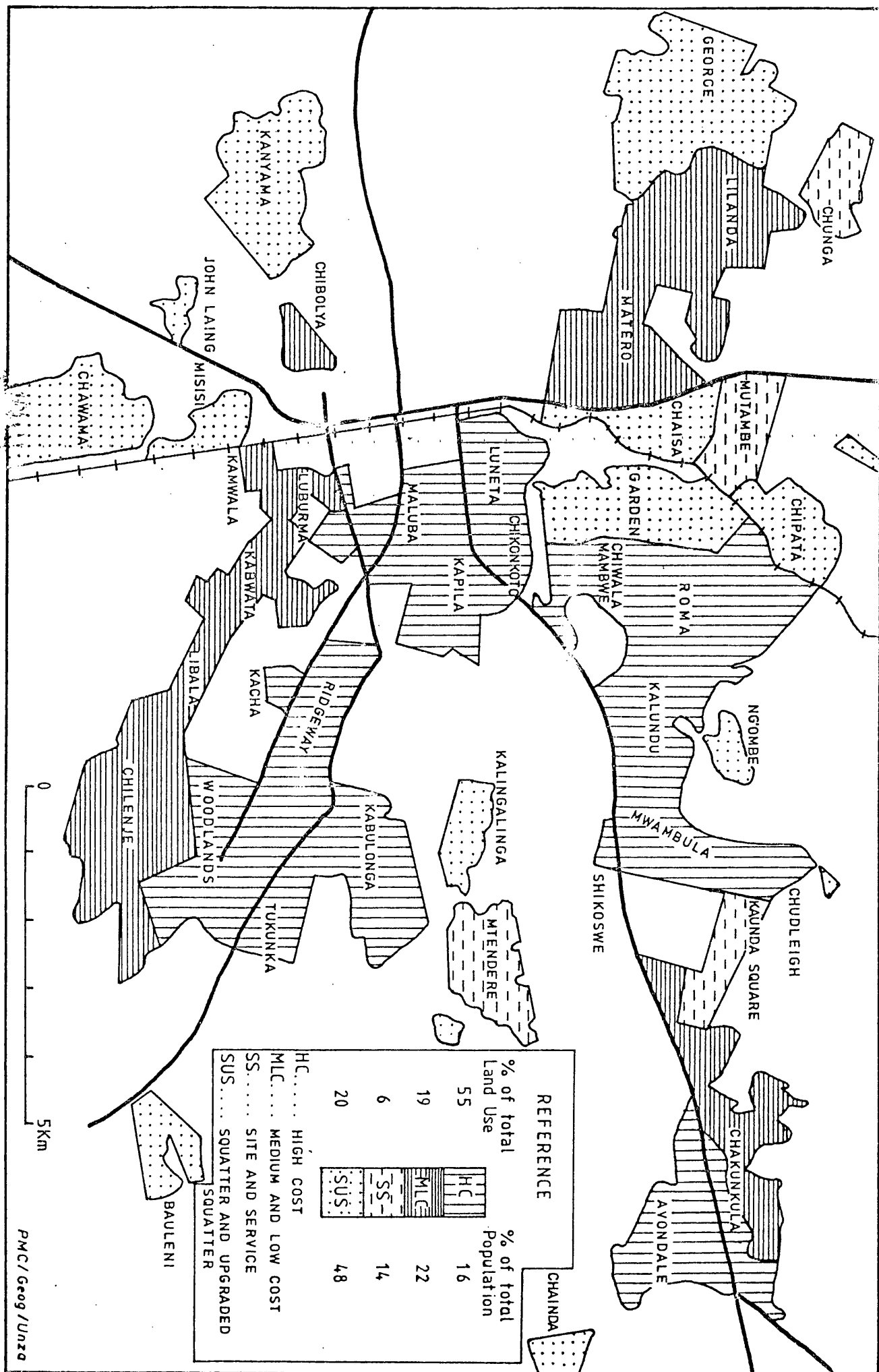
38 It has been pointed out that the growth of other towns after independence has been absorbing some migrants who otherwise would be heading for Lusaka, see C.N.Himonga, op cit, 50 and also Census of Population and Housing, Preliminary Report, Central Statistical Office, (CSO), Lusaka, 1981, 4.

39 A.P.Wood, op cit, 167.

40 Ibid, 167

41 Ibid, 169.

- 42 See also M.M.Burdette, op cit, 41.
- 43 A.P.Wood, op cit, 176.
- 44 T.Seymour, "The Causes of Squatter Settlement: The Case of Lusaka, Zambia in an International Context" in J.H.Simons, T.Seymour, R.Martin and M.S.Muller (eds) Slums or Self-Reliance?, Urban Growth in Zambia, (mimeograph) University of Zambia Institute for African Studies, Communication No. 12, Lusaka, 1976, 61
- 45 Ibid, 61.
- 46 Ibid, 62.
- 47 One study estimated that only 40% of children from squatter areas of Lusaka got a primary school place, see S.Knauder, Shacks and Mansions: An Anaylsis of the Integrated Housing Policy in Zambia, Lusaka, 1982, 17.
- 48 New Econominc Recovery Programme, Fourth National Development Plan, op cit, 96.
- 49 R.Boidouille, "Men and Women's Work Opportunities in the Urban Informal Sector: The Case of Some Urban Areas in Lusaka", Manpower Research Report, No. 10, 1982, Institute for African Studies, University of Zambia, 11.
- 50 J.Fry, Unemployment and Income Distribution in the African Economy, London, 1979, 57.
- 51 J.Clark and C.Allison, op cit, 27.
- 52 A.L.Epstein, Urbanization and Kinship: The Domestic Domain on the Copperbelt of Zambia, 1950-1956, London, 1981.
- 53 M.M.Burdette, op cit, 55.
- 54 P.Ohadike, "Demographic Perspectives in Zambia Rural-Urban Growth and Social Change" Zambian Papers, 1981, No. 15, 73, University of Zambia, Institute for African Studies.
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CHAPTER 2

THE CRIMINAL JUSTICE SYSTEM.

2:1 Customary Property Crime and Punishment.

2:1 (a) Law and Procedure.

In traditional Zambian society, there seems to have been no system of classification of property offences in such categories as robbery, burglary, house breaking, theft and others. All property offences were generally referred to as "theft". But some classification was made which depended on the circumstances of the offence. For instance, the nature of property stolen distinguished one theft from the other. Similarly, the type of victim involved such as the chief or headman aggravated the offence and distinguished it from the ordinary theft.

The procedure which was followed to punish the defendant depended on the circumstances of the case. If the defendant was caught red-handed and admitted the offence, there was no trial. The defendant was promptly punished. On the other hand, a trial was held in cases where the suspect denied the offence or where he¹ was unknown. The trials were by ordeal, described as:

...the doing or suffering by a party of something that is intrinsically dangerous, but which is harmless to the innocent and harmful only to the guilty".2.

If the suspect was unknown, the victim himself first consulted a diviner who would name the suspect or a group of suspects. The diviner who, according to Elias was, found in all African societies, relied on his:

..."own extensive knowledge of men and affairs throughout his district and partly from what by careful questioning and logical inferences he may gather from the

consultant's own stories and expressions of opinion".3.

If the person or persons named by the diviner refused to admit the offence, trial by ordeal took place. As far as property offences were concerned, two types of trial by ordeal were common. The first trial by ordeal consisted of the administration of the mwafi, a practice among the Lunda of Luapula Province of Zambia, described by Larceda as:

"A mixture of some bark....if the supposed offender is luck enough to vomit his innocence was feted with great joy and his accuser fined".4.

On the other hand, if after the administration of the mwafi, the suspect became drunk, ill or died, he was pronounced guilty. If the suspect died in the course of trial by ordeal, guilt was transferred to his relatives. A similar practice was reported in the then Southern Rhodesia. In some cases, dogs or fowls belonging to suspects were made to take the mwafi instead of the actual suspect. The death of a dog or a fowl incriminated its owner. The second form of trial by ordeal was the boiling water test. Among the Lozi of Western Province of Zambia, Gluckman observed:

"A suspected thief, against whom there was some but insufficient evidence, was made either to lick a hot iron or to take a stone out of boiling water. Fat was then rubbed on the tongue or skin and if a blister formed, the accused was guilty".7.

Among the Bemba speaking people of both Luapula and Northern Provinces, the common practice was to make the suspect plunge his fore-arm into boiling water containing some medicine. If the suspect was not burnt, he was innocent and was proved guilty if otherwise.

As mentioned above, the underlying belief surrounding trial by ordeal was that God or the ancestral spirits would protect the innocent and punish the guilty. There was no strong evidence that people were forced to undergo trial by ordeal or that the trial itself was manipulated by the victims. Instead, much of the available evidence suggests that it was common for suspects to willingly volunteer to take the mwafi in order to clear themselves of possible complicity.

There were isolated allegations, that in some cases, emetic was added to the mwafi to induce vomiting. In the case of the boiling water test, the allegation was that medicine was supplied to alter its temperature. In those circumstances, manipulation was allegedly done by a witch doctor hired by the defendant or his relatives.

There might have been some element of truth in the possibility of manipulation of trial by ordeal. The test itself seemed to lack objectivity and it was possible that people already known as trouble makers or those who had stolen before might have been selected to undergo the test. Pressure to undergo the test was exerted on suspects as refusal was regarded as evidence of guilty.

Trial by ordeal seems to have phased out by the time the B.S.A.Co. rule was established. It had been replaced by elaborate public hearings. According to Epstein, those hearings were characterised by:

"...an apparent simplicity and lack of formality...the coming and going of people, the freedom of spectators to participate in the proceedings, the garrulity of litigants and the apparent irrelevance of much of their testimony; in

short the general absence of technicalities, particularly in regard to the rules of evidence".10.

On the day of the hearing, spectators and supporters of the parties gathered and squatted in a circle or semi-circle. The defendant sat in the centre facing the chief or his headman hearing the case. The aggrieved party would state his case against the defendant, followed by denials or counter-accusations. Among the Lozi, Gluckman observed:

"The litigants supported by their witnesses and kinsmen, sit before the judge against the part which holds up the roof, the plaintiff, without interruption states his case with full and seemingly irrelevant detail. The defendant replies similarly. Their witnesses, who have heard statements, then speak. There are no lawyers to represent the parties. The Kuta (the court), assisted by anyone present, proceeds to cross-examine and to pit the parties and witnesses against one another".11.

More recently, Canter has observed a similar practice among the Lenje-speaking people of Lusaka Rural. He says:

"After the testimony of the litigants, everyone present is free to argue, contradict, elaborate and put forth tentative solutions".12.

Throughout those hearings, the most important task of the court was to maintain the existing social relations. It was therefore common in any hearing to enquire beyond the confines of the dispute at hand. The reason for this was that the subject at hand, say theft of a goat, might be a "symptom" of an underlying or unresolved dispute or misunderstanding arising, for instance, out of land. The success of the hearing was measured in terms of its ability to settle all outstanding or related disputes and bring permanent peace between the parties. Thus Canter has observed:

"The hearing begins with the testimony of the plaintiff and then the defendant. Again no attempt is made to keep testimony to the case at hand. Individuals are likely to range widely over past and present issues. In this way, the case is put in a contextual setting".¹⁴

In the traditional criminal process, no distinction seems to have been made between the investigation of crime and the trial. That was particularly the case where the defendant was unknown, in which case trial by ordeal was both an investigation as well as the trial itself.

.....
2:1 (b) Punishment.

Punishment for property offences depended on the type of property as well as the victim involved. Among the Bemba and the Lozi, child and cattle theft were punishable by death. Similarly, theft¹⁵ of any property belonging to the chief was punishable by death. Theft of other animals such as goats, sheep, and crops was punishable by various types of mutilations (such as of hands and¹⁶ ears) and gouging out of eyes. In some cases, the owner of the property stolen meted out instant punishment if he caught the thief red-handed. In the majority of cases, however, punishment was carried out by the chief's counsellors.

A significant factor about punishment was the prevalence of compensation and/or restitution of property, ordered as additional punishment in nearly all cases. Even in cases where death was the punishment, relatives of the defendant were expected to compensate the victim. In all cases, the matter was never considered settled until compensation was paid. Thus compensation was appropriately called akashika mukofu among the

Bemba which literally meant "the burial of the scar". At the time the B.S.A.Co rule was established, most of the severe punishments such as mutilations had largely died out and compensation had become the most widely used form of punishment. In its 1900-1902 Annual Report, the B.S.A.Co. noted that: "...mutilations as punishment, so common among the Bemba, is happily never heard
17
of". In Barotseland (now Western Province), trial by ordeal and
18
mutilations were banned by the Litunga in the early 1890s.

There is documentary evidence to the effect that prisons were unknown in Zambia before they were introduced by the colonial power, as will be shown later in this chapter. It seems that the absence of prisons in African communities and the prevalence of compensation and restitution were connected. The nature of the communities provided the environment in which prisons were unnecessary but in which compensation and restitution satisfied the needs of justice. The extended family and kinship systems already referred to in chapter 1 and the lack of anonymity provided a society which was conciliatory and accommodating and in which compensation was needed to promote cohesion and to prevent the break down of the communities.

The prevalence of compensation led some early writers on African law to conclude that there was no distinction between civil and criminal law. Thus P.J.Mcdonell, the then legal adviser to the North-Eastern Rhodesia administration once remarked:

"Africans failed to grasp the clear distinction between the civil wrong which is compensated by damages to the individual and the criminal wrong which is compensated by fine or forced labour exacted by the community".¹⁹.

Similarly, one district officer in the Luapula District of Northern Rhodesia wrote of the local people in 1910: "...they have no definite law as we understand it. Every offence, even murder,²⁰ is merely a civil action to recover compensation".

Another basis upon which the assertion that African law did not distinguish between criminal and civil law was made, was that redress was exacted by the individual victim. In other words, redress was allegedly a private affair between the offender and the victim. But as already pointed out, private redress was only resorted to where the offender was caught red-handed or where he readily admitted the offence and offered or accepted an immediate settlement of the dispute. In the majority of cases, a hearing was held before a chief or his appointed representative as already seen.

Elias has pointed out that:

"...like any other law, African law differentiated between offences that must be publicly punished by society at large and those that should be left to private redress".²¹

Political offences such as rebellion against tribal authority, sorcery, murder, violation of hunting and fishing rules were all treated as crimes. As mentioned earlier, compensation in the case of property offences was an additional order, probably in the same way that under English law, a victim of assault may bring a private civil suit, with the State reserving the right to institute criminal proceedings. Chanock has shown that in Northern Rhodesia, magistrates were advised by judges to:

"distinguish between crime and tort by looking at the punishment which it had been the custom to visit upon an act: where death, mutilation, beatings, enslavement or exile

had been the penalty, then the act was clearly, in native eyes, a crime".22.

On the other hand, matters such as land and marriage disputes (other than adultery) were regarded as civil matters. Thus the well known customary penalties such as death and mutilations were never ordered against defendants, for instance, in land disputes. Similarly, Cunnison, writing about the Lunda has said:

"A few misdemeanours were regarded as crimes against the state. Homicide and sorcery, and possibly adultery, had to come before Lunda courts, although the matter was usually raised by the family of the victim. But the real crime against the state was slander of the king or of the Lunda, or treasonable talk.... Punishments in case of offences against the state were laid down by Kazembe (the King). They were usually physical: the cutting off of fingers, ears or nose. Kazembe had a special officer, the katamatwi (cutter of ears) who carried an instrument like a large pair of scissors for this purpose".23.

2:1 (c) Crime Prevention and Defences.

The most common method of protecting property, especially crops was to cast a spell on them with the result that theft brought an immediate and permanent physical injury to the thief. The physical injury usually took the form of loss of the use of one hand or both through paralysis. This spell was known as tembwe, among the Bemba-speaking people. It has been reported that a similar practice prevailed among the Shona people of Zimbabwe. In order to protect their property from thieves, the Shona people, applied some medicine called rukwa. It was believed that the medicine caused the thief to become deformed, or to develop
24
swollen abdomen and burning red mouth. These methods worked as a form of deterrence, but their potential to inflict harm on the thief was doubtful.

The taking of property belonging to an immediate or extended family member was not theft. This rule was based on two assumptions. Firstly, property of a relative was communally owned within the family. Secondly, it was assumed that permission to take and use the property in question already existed because the person had a lawful claim to it. Strictly speaking theft was only committed if the property involved belonged to someone outside the extended family system. Similarly, a starving man who took crops from a field in order to feed himself did not commit any offence. It only became theft if he took more than he needed²⁵ at the time. If the person offered some of the crops for sale, then that was regarded as evidence of having taken more than what he needed for consumption and he was punished accordingly.

It is also a well recognised practice that anyone employed in food production work such as farming, was entitled to take some of the food he produced for his own consumption. The Bemba-speaking people called this principle Ubomba mwibala alya ifya mwibala meaning that a farm worker is entitled to feed from what he produces for his employer. It became theft as in the case above, if the worker took more than he needed for consumption.

²⁶
The same custom has been observed among the Shona of Zimbabwe. In this study, 37% of the farm workers interviewed, who were convicted of theft by servants informed the writer that they did not regard themselves as offenders. They claimed that they had a right to consume some of what they produced on the farms.

Under customary law, it was common for the victim to plead with the chief to reprieve the defendant. This was particularly the

case where the victim and the defendant were known to each other. In most cases, the chief acceded to the demands of the victim and spared the limb or life of the defendant. As we shall see in chapter 5, this practice has survived the abolition of customary law and practice in that personal acquaintance of the parties is often crucial in the victim's decision to withdraw the case. Further, as we shall see in chapters 4 and 5, the victim of crime plays a vital role in the criminal process, i.e, from the time the decision to prosecute is being taken up to the time of judgment.

The rules of customary criminal law were simple and easily understood by all. One of the cardinal rules was that the wronged party was the person whose interests were to be satisfied first and foremost. Compensation therefore became the most preferred sanction. Kinship and extended family systems both of which were then very strong provided the environment in which compensation flourished. Its procedural aspects encouraged public participation which in turn made the system both accessible and acceptable.

2:2 Criminal Justice During the Colonial Period

2:2 (a) Law, Courts and the People.

Customary law and criminal justice as described above were generally recognised under B.S.A.Co. rule, but their application was regulated by the B.S.A.Co. Charter 1889 section 14 of which stated that:

"In the administration of justice to the people in the Territory, careful regard shall always be had to the customs and laws of the class or tribe or nation to which they

belong...but subject to any British laws which may be in force in any of the Territories".

The 1900-1902 Report of the B.S.A.Co., however, was more specific on the question of the conditions under which African customary law was to be applied as it made the first mention of the "repugnancy clause". It stated: "Native Courts have to recognise established native law in so far as it is not repugnant to
28
natural justice and morality".

Under B.S.A.Co. rule, three levels of courts were established. At the lowest level were the Native Courts presided over by Native Commissioners to hear cases in which Africans were
29
involved. At the next level were the magistrates' courts and at the highest level was the High Court of the Territory.

There is a general lack of statistical information about crime during the time of the B.S.A.Co rule. The little that is available is of limited use. For instance, the B.S.A.Co. Report already mentioned above stated that 8 people were tried and convicted of manslaughter and one was tried and convicted of robbery in the Luangwa District during the previous year. The Report also noted that the low number of offences in proportion to the population was attributed to the presence of
30
Administration officials which was regarded as a deterrent. The extent to which reports such as this one reflected the reality of the situation is difficult to tell. But what is probably clear is that a substantial number of offences did not get to the official attention for reasons which will become obvious at a later stage in this section.

The B.S.A.Co. rule was "a direct form of administration" in which chiefs played a minor role. Throughout the entire period of company rule, chiefs were divested of their traditional jurisdiction in criminal offences, though they retained their jurisdiction in civil matters, such as family law.

As we have already seen in chapter 1, North Western Rhodesia and North Eastern Rhodesia were merged to form one country in 1911. The repugnancy clause, to which we shall return at a later stage, was retained in the statute books of the newly created country. Thus sections 18, 22 and 35 of the Northern Rhodesia Order-in-Council, 1911 which announced the merger, stated that:

"Native Law shall be followed where parties are native as long as it is not repugnant to natural justice or morality or to any Order made by His Majesty in Council or by any Proclamation made under this Order".

The High Court Proclamation, 1913 carried substantially the same provision.

When the British Government took over administration of Northern Rhodesia as a Protectorate, the repugnancy clause was incorporated in the Protectorate's statutes. Section 12 of the Native Courts Ordinance, 1936 stated that:

"Subject to the provisions of this Ordinance, a Native Court shall administer:

(a) the Native Law and custom prevailing in the area of the jurisdiction of the court, so far as it is not repugnant to justice or morality or inconsistent with the provisions of any Order-in-Council or with any other law in force in the Territory".

It will be seen in a later section of this chapter that the repugnancy clause has been reproduced verbatim in section 16 of the Subordinate Courts' Act, Cap 45 of the Laws of Zambia.

In contrast with the period of B.S.A.Co. rule, chiefs played a role under the Crown rule through the system of Indirect Rule. Indirect Rule was first applied in Northern Nigeria by Lord Lugard before the First World War and it was later introduced to Tanganyika by Sir Donald Cameron in 1926. It finally came to Northern Rhodesia in 1936 under the Governorship of Sir James Maxwell. Cameron defined Indirect Rule as:

"... adapting for the purpose of local government the institutions which the native people have evolved for themselves, so that they may develop in a constitutional manner from their own past, guided and restrained by the traditions and sanctions which they have inherited (moulded or modified as they may be on the advice of British officers) and by the general advice and control of those officers".³⁴.

Under Indirect Rule, chiefs as an institution were reorganised and given powers to preside over the newly reconstituted Native Courts under the (new) Native Courts Ordinance, 1936. The Native Courts had jurisdiction in both civil and criminal cases involving Africans, except in cases of homicide and witchcraft. They had jurisdiction over most property offences as well as over other offences created under various statutes such as the ³⁵ Employment of Natives Ordinance, Forest Ordinance and others.

From the Native Courts, an appeal lay to the Native Appeal Courts from where it lay to the District Commissioner. Provincial Commissioners' Courts constituted the next level of courts, from where an appeal lay to the High Court, the highest court in country. The law administered in the High Court and in the District and Provincial Commissioners' Courts was the law of England, being the common law, statute law and doctrines of equity in force in England on 17th. August, 1911 and other later

English statutes made applicable to the Territory as well as certain Orders-in-Council and Northern Rhodesian Proclamations and Ordinances. As for the practice and procedures in those courts, the governing law was the Criminal Procedure Code of the Territory, enacted in 1933 in conformity with the procedures followed by the English Supreme Court of Justice and the English Courts of Summary Jurisdiction.³⁶

As already mentioned above, Native Courts administered customary law. In the urban areas (mainly the line of rail), where migrant workers were somewhat outside the ambit of their own customary law, a choice of law problem emerged. That problem was solved by a system started in 1937 in which Native Authorities in areas from which most urban workers came, sent representatives appointed by chiefs to come and sit in District Commissioners' courts as assessors. In the Copperbelt town of Chingola, for example, the first representatives came from the main labour supplying areas of Fort Rosebery (now Mansa) in Luapula Province, Fort Jameson (now Chipata) in Eastern Province, Luwingu in Northern Province and Kasempa in North Western Province.³⁷ That system proved successful and the chiefs' representatives were later transformed into Urban Native Courts.

We may now turn to the question of the operation of the repugnancy clause. The precise meaning of the term "repugnancy to justice or morality" is unclear. Professor Read has described its application to East Africa as "potentially the most sweeping" of all the restrictions placed on the application of African customary law.³⁸

The proportion of cases in which it was invoked during the colonial period is small and difficult to ascertain. It was, undoubtedly the basis upon which trial by ordeal and severe penalties such as mutilations were discouraged. But as already seen above, most of those practices had disappeared by the time Europeans arrived in the country.

One of the reported cases in which the repugnancy clause was addressed, though indirectly, was R V Mubanga and Sakeni.³⁹ The issue in that case was the refusal by the accused persons to abide by the Bemba custom which required them and other subjects to contribute millet towards a national ceremony. Their refusal was based on the ground that the accused persons, being Christians, were not bound by customary law which they thought encouraged the worship of gods. At the time of this case, it was no longer an offence under customary law to refuse to contribute to the ceremony. The District Commissioner therefore set aside the fines imposed on them by the Native Court and acquitted them. Nevertheless, the District Commissioner's observation is important for the purpose of this study. He said that:

"...even if it was an offence under customary law, the accused would have had no case to answer because the existence of such an offence is not only unknown to the Penal Code of this Territory, but it is also inconsistent with the common law and repugnant to justice".⁴⁰

Another case in which the repugnancy clause was in issue was R V Matengula.⁴¹ In that case three accused persons were pall bearers for the coffin of their neighbour who died in the village. According to the custom of the Lamba people of the Copperbelt, to which the accused persons belonged, a dead person can "point

out" the person responsible for his death. In this case, the dead man allegedly "pointed out" the deceased, causing the coffin to ram her several times in the chest as the three accused persons carried it. The deceased sustained severe injuries from which she died later. The accused persons were charged with murder. Their defence was that they were acting under a supernatural force over which they had no control.

Counsel for the Crown argued that although the custom of "pointing out" was in existence, "it was repugnant to justice as we know it". Mr Justice Evans agreed with counsel and held that "there is no doubt that this custom, this Lamba custom, is repugnant to
42
natural justice".

The repugnancy clause has received little recorded application and this is not peculiar to Zambia. The same experience has been noted in East Africa. According to Professor Read, the main reason for this in East Africa is that:

"The rules of customary law were evolving so rapidly, under the varied influences of colonial rule, that they came to accord sufficiently with English law to make judicial application of the repugnancy provision superfluous".⁴³.

In the Zambian context, the reason for scanty evidence on the application of the repugnancy clause is that the majority of cases in which that clause could have been applied never reached the English courts, for reasons which will become obvious soon.

The philosophy of the newly established English courts in the whole of Central Africa was expounded by Lord Hailey as follows:

"We are endeavouring to introduce to the Africans the concept of the public offence...and ...punishment instead of compensation and other forms of arbitral adjustments. In

Lilongwe, for instance, the District Commissioner pointed out that it was a serious error to punish offenders by compensation award only".⁴⁴

The Lilongwe District Commissioner had put it this way:

"...a chief's main objective in all cases is to satisfy the complainant, but clearly the thief is not punished as he should be and in many cases it is the thief's relations who pay the complainant with the result that the wrong-doer continues to commit crimes".⁴⁵.

This was the philosophy behind sentencing in the English courts as well as in the Native Courts presided over by Native Commissioners. The approach in other British colonies was similar. In Uganda for example, the Governor was reported as having said:

"We have, rightly or wrongly imposed upon Natives of Uganda in alien system of justice. Our objective in doing so was presumably in the main, to inculcate more satisfactory ideas of right and wrong, to teach the Native that crime is in the main, to be regarded as an offence against society and not as an offence against the individual".⁴⁶.

In East Africa, the Bushe Commission commented on African customary law principles (which treated crimes as wrongs against the victims and not against the state) which favoured compensation as follows:

"Clearly, a system of substantive law which proceeded on such principles as these could not be tolerated in any part of the British Empire. It is the duty of government to civilise and to maintain peace and good order, and this can only be done by the introduction of British concepts of wrong doing... Crime must be regarded first and foremost as an offence against the community if the people of these territories are to advance in enlightenment and prosperity".⁴⁷.

When the English courts were established in the 1890s, Africans were very eager to try the new justice in the hope that it provided better remedies than those they were accustomed to under customary law. According to Chanock, by 1910, many Africans began

to realise that their trust in the new justice was ill placed. Many Africans found "actual procedures uncertain, unsympathetic⁴⁸ and arbitrary". They could not understand why the offender had to go to prison without paying any compensation. They also found it incomprehensible that certain punishments, particularly fines, were imposed to benefit, not the victim of the crime, but the new abstract entity called the state. In addition, many Africans found the court room drama confusing. The interpreters seemed to control the business of the courts as magistrates on the one hand and the parties (to the offence) on the other could not speak to each other directly. In the end justice suffered, thus Chanock's study, for instance, found that:

"Witnesses feared the courts, fled when summoned and had to be captured, a process which could not be conducive to building confidence in a new system of fair and orderly justice. The court records abound with references to accuseds, witnesses and parties to actions being nervous, incoherent and often incomprehending in court".⁴⁹

Collective punishment , introduced in 1912, also did much to undermine people's confidence in the new system of justice. Under The Collective Punishment Proclamation, 1912, the Administrator was empowered to impose fines on villages or on communities for the failure of one villager or a member of the community to restore the stolen property allegedly traced to that village or community. If a person was fatally wounded or injured or the body was found in the village, all the villagers were deemed to have committed the offence unless they had no opportunity to prevent the offence or arrest the offender or they had used all⁵⁰ reasonable means to bring the offender to justice. Collective punishment was an alien concept. In other words,

it was not based on customary notions of justice. Under customary law it was not an offence not to report wrong doing to the chief. As a matter of fact, certain offences as already seen above, were dealt with privately between the offender and the victim. It is common knowledge that under customary law the burden of punishment, such as compensation, was shared among the kith and kin, but that was not collective punishment in the sense envisaged by the Collective Punishment Proclamation, 1912. Individuals under customary law were not compelled to share the burden of punishment but did so voluntarily, mainly as a social obligation arising out of blood relationships and the extended family system.

As a result of all this, the administration of criminal justice in Northern Rhodesia took on an interesting dimension. The volume of ordinary criminal offences brought before Native Courts started to decline. On the other hand, the volume of criminal offences arising out of statutes enacted by the colonial power increased. Thus in Chinsali District (in the Northern Province), for instance, 390 criminal cases were heard in the Native Courts in 1948. Of those, 213 cases arose from breaches of Forestry and Health Ordinances and the rest arose from customary law. By 1951, the proportion of criminal offences arising out of customary law declined from around 45% in 1948 to only 9% in 1951. In that year, a total of 1760 offences were tried in Native Courts in the same District out of which 1608 arose from breaches of various statutes. This led the District Officer to comment:

"It appears that in the recorded cases of the Native Courts, there is little that could be described as native law and custom. It might be true that African law was being administered outside the official courts".⁵¹.

This phenomenon was not restricted to one area. In Abercorn (now Mbala) in the Northern Province, in the first two years of its operation (1897-1899), the Native Court dealt with such crimes as homicide and arson. By 1900, its main business had become the enforcement of contractual obligations of employees arising out of employer/ employee relationships. A more recent study by Clifford (1960) found that of the 25,000 criminal cases heard in the Urban Native Courts of Northern Rhodesia, only 10% were crimes in the real sense of the word. The rest of the cases arose out of statutes creating offences such as the illegal
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residence of unemployed Africans in urban areas.

Further evidence suggests that as early as 1930, it had become clear to the colonial officials that the whole experiment of the "new justice" had never been fully accepted by Africans. The main reason for that was the failure of the new system to take into account African notions of criminal justice, particularly the award of compensation to victims of crime. Thus the 1931 Annual Report of the Native Affairs read as follows:

"There is ample evidence that most Native Authorities are capable of discovering and unravelling serious crime within the limits of their respective spheres and that they are willing to hand over to justice the criminals in their midst. Without compensation, the arrest and punishment of natives who commit crimes in the native areas would be difficult if not impossible with the existing Provincial staff. It is said that in some instances, injured parties prefer to receive compensation rather than that the offender should be imprisoned in the government goal.⁵³.

It will be seen in chapters 5 and 6 that the current criminal justice system, particularly the sentencing patterns as well as the procedures, are a carry over from the colonial past. It will also be shown in chapter 5 that the system has not been fully accepted by the consumers of criminal justice in Lusaka, partly due to the continuities of the past policies.

Statistical evidence about court disposals during the colonial period is not readily available. The little that is available is of limited use. Table 3 for instance, only shows the number of offenders sentenced to imprisonment for various offences between 1947-1953 mainly by urban courts. The Table shows that annually an average of 50.3% of offenders between 1947-1953 were convicted of property offences. The abnormally large number of offenders sent to prison for property offences without violence in 1951 has no immediate explanation. It is hard to imagine how the prison authorities coped with the high number of offenders sent to prison for all offences in 1951, which was nearly 3 times the number sent to prison during the previous year. What is clear, however, is that during that time, African protests against plans to introduce the Federation of Rhodesia and Nyasaland, introduced in 1953, had taken a violent turn. But whether or not that explains the high number of offenders imprisoned in 1951 needs further evidence.

Table 4 shows the sentence length for all offenders sent to prison between 1947-1953. Unfortunately, it does not tell us the offences to which the sentence lengths apply. The Table shows that between 1947-1950, a substantial proportion of offenders

were sent to prison for a period of under one month. During the same period, the proportion of offenders sent to prison for 18 months and over was quite small. But between 1951-1953, that pattern seems to have changed. During that period, the proportion of offenders sent to prison for less than one month declined whilst that of offenders sent to prison for 18 months and over increased. It will be shown in chapter 6 that in Lusaka, the proportion of offenders sent to prison for less than 3 months has continued to decline while that for offenders sent to prison for 18 months and over has been on the increase.

2:2 (b) The Development of the Zambian Police Force.

Before B.S.A.Co. rule, the communities that lived in the present day Zambia had no police force. The chief's orders and court judgments were enforced by his counsellors. As has already been mentioned, the two territories that comprised Northern Rhodesia, i.e North Eastern Rhodesia and North Western Rhodesia, were administered separately until their merger in 1911. The different set of circumstances existing in the two territories meant that the police forces were to be raised differently.

After the death of Dr. David Livingstone in 1873, the Africa Lakes Company was formed in order to carry out commercial activities and to assist missionary work in Central Africa. In Northern Rhodesia, these dual functions of the African Lakes Co. were increasingly being frustrated by the slave traders, led by Mlozi, the last of the Arab traders. At the same time, the Germans were making moves to occupy the northern part of North

Eastern Rhodesia. These two factors necessitated the establishment of a police force in the territory.

The first ever police force in North Eastern Rhodesia was not raised from the local population. It was raised in Nyasaland (now Malawi) by H.H. Johnston, the Imperial Commissioner of that territory, in 1891. The force did not consist of the local people of Nyasaland, but of volunteers from the Indian Army: 70
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 sepoy, 40 mozbi sikhs and 20 mohammedans. The B.S.A.co. had not at that time established an effective administration in North Eastern Rhodesia. Outside help was therefore necessary. What is not clear, however, is why Mr. Johnston had to rely on Indians. But as it will be seen later in this chapter, the general policy of the B.S.A.Co. was that the police force should not be composed of local inhabitants.

The first task of the new police force, which in all respects was like an army, was to engage and expel slave traders from North Eastern Rhodesia, which was successfully completed with the defeat of Mlozi in the early 1890s. The armed police force was also used to deal with recalcitrant tribes in the territory. For instance, it fought two wars with the Bembas in 1897 and in 1898
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 and with the Ngonis in 1897-1898.

In 1893, the Indians' term of service expired and they were sent home. They were immediately replaced by men from Zanzibar, who in turn were replaced in 1896 by Mukwa people from Mozambique and Tongas from Malawi as policemen. It was a deliberate policy that

the police should not perform their functions in areas from which they came, so that in the event of a serious disturbance, they would not be obliged to turn their weapons on their own kith and kin. Thus Brelsford observed:

"It has been obvious that the first police and military forces could not be composed of the primitive inhabitants of the territories taken over, so that elements, exortic though they seem now, had to be brought from outside countries to form the forces responsible for law and order".⁵⁸

In North Western Rhodesia, the raising of the police force was less dramatic, in the sense that the local people there did not show resistance to the B.S.A.Co. occupation. In addition, Arab slave traders did not seem to have penetrated the area. But even though that was the case, there was a striking similarity with North Eastern Rhodesia in that the first police force there was not raised from the local people. It was composed of an army of volunteers that escorted Major R.F.Coryndon when he travelled from Southern Rhodesia to take up residence as the first Commissioner of North Western Rhodesia. The escort whose composition was all European, was led by Sergeant Dobson, assisted by Corporal Macaulay and several troopers. It was⁵⁹ described as a military force "by training and tradition".

The policy of recruiting the police from so-called alien tribes, fully implemented in North Eastern Rhodesia, was introduced in North Western Rhodesia as well. In the B.S.A.Co. Annual Report already referred to, R.F.Coryndon, the Resident Commissioner of North Western Rhodesia, had this to say:

"Experience has shown that it is always advisable to police a country with, if possible, natives from an alien tribe, and with this view, an officer is being sent to recruit in

the neighbourhood of Lake Mweru in North Eastern Rhodesia. They should arrive here in November of this year."60.

Later he stated:

"One hundred and fifty alien natives are about to be recruited in North Eastern Rhodesia to serve in this country, which is a very good plan, as it is most important that natives should not be entirely recruited in the country in which they serve as police. If these men turn out satisfactorily, I should recommend that more be recruited next year in place of the men recruited in this country".61.

Thus the 1906 and 1907 B.S.A.Co. Annual Reports stated that the Barotse Native Police (as the North Western Rhodesia police force was also known) was almost entirely recruited from inhabitants of North Eastern Rhodesia. The 1907 Annual Report added that the North Western Rhodesia police force was "a military one maintained for purposes of defence and occasionally escort of civic officials".⁶²

Following the amalgamation of North Eastern and North Western Rhodesia, the two police forces were also merged by Proclamation (Number 18 of 1912) to form the Northern Rhodesia Police Force. The new Police Force was military in outlook as evidenced by section 7 of the Northern Rhodesia Police Proclamation (Number 17 of 1912) which stated as follows:

"In case of any war or other emergency, members of the force are liable to be employed for police and military purposes either within limits of Northern Rhodesia Order-in-Council 1911 or within the limits of Southern Rhodesia Order-in-Council 1890 and when so employed shall be subject to such terms and regulations as the High Commissioner may determine".

Thus when the First World War broke out in 1914, the Northern Rhodesia Police Force contributed men to the forces of the British Empire.

The old policy of recruiting policemen from alien tribes still

continued and recruits from the Eastern Province of Northern Rhodesia were, for instance, posted for service to Kasama in the Northern Province and vice versa. This policy still continues today, justified as being in the interest of nation building. In chapter 4, we shall see whether this policy hinders or enhances police accountability and whether it promotes good police-public relations.

The dual functions of the Northern Rhodesia Police Force as both soldiers and policemen continued up to 1932. In that year, the Northern Rhodesia Police Ordinance (1932) established a civil police force as it is known today. The newly-created police force consisted of 7 superior officers, 73 inspectors (all of whom were Europeans) and 447 other ranks (all of whom were Africans). Efforts were made to recruit more men and to give them adequate training, but the outbreak of the Second World War frustrated that exercise. Reorganization and training of the new police force resumed after the war. The growth of urbanization and industrialization, particularly on the Copperbelt, required a well-trained police force to ensure that law and order was maintained. As a matter of fact, during much of the colonial period, around 47% of the total strength of the police force was⁶³ deployed on the Copperbelt. In 1954, the Police Training School was opened at Lilayi near Lusaka.

In 1964, the Northern Rhodesia Police Force changed its name to the Zambia Police Force. By that time, its strength had reached 6,000 men. Most expatriate officers left the force at independence in 1964. Up to the time of independence, the highest

rank for Africans in the force was that of African Inspector. An intensive training programme was initiated for the few African officers in order to enable them to take up leadership positions in new Police Force.

Today, the strength of the force is 11,642 men and women, of whom 237 are superior officers, 792 are subordinate officers and the rest are other ranks. The Zambia Police Force is headed by the Inspector General of Police who is appointed by the President. The President also appoints the Commissioner of Police, who is the second in command and the Deputy Commissioner of Police. Other superior officers are appointed by the Police and Prisons Service Commission. Later in this thesis, we shall see whether the political control of the police through political appointments of the command and other measures to be seen in chapter 4 hamper or enhances police accountability to the public.

2:2 (c) The Development of the Prison System.

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Prisons did not exist in traditional Zambian society. As already seen in the first section of this chapter, all offenders were punished in their communities.

In North Eastern Rhodesia, a regulation was formulated in 1908 to govern the establishment and administration of prisons. It stated:

"There shall be in the Territory of North Eastern Rhodesia, set apart as prisons such buildings as the Administration from time to time by notice in the Gazette shall approve for that purpose".⁶⁶

The Regulation was implemented in 1909 when for the first time, prisons were established at Fort Jameson (now Chipata) and Kabwe, some 19 years after B.S.A Co. rule began in North Eastern Rhodesia. Other prisons were opened at Livingstone in 1914, at Fort Rosebery (now Mansa) in 1920 and at Lusaka⁶⁷ and Ndola in 1931 and 1932 respectively. Before 1909, when the first prison was opened in North Eastern Rhodesia, prisoners from the territory were transferred to Southern Rhodesian prisons where they served their sentences at a fee of 2s. per prisoner for⁶⁸ maintenance.

In North Western Rhodesia, the first mention of prisons was contained in a letter from Mr.H.Rangley, a magistrate, to Mr.C.Coryndon, the Resident Commissioner, dated 13th. October 1903. In that letter, it was suggested that an Ordinance should be enacted in order to enable the Colonial Prisoners Removal Act, 1884, a statute of general application, applicable to North Western Rhodesia "as there is no prison in which a prisoner⁶⁹ could properly undergo a sentence of long duration". That suggestion was not acted upon until 1907 when the Prisoners Removal Proclamation No. 19 of 1907 as amended by Proclamation No. 32 of 1910 was made. That Proclamation provided the legal framework for the transfer of prisoners from North Western Rhodesia to South African prisons at a fee of between 2s 3d and 2s 6d per prisoner for maintenance. It seems that no steps were taken to establish prisons in North Western Rhodesia before the amalgamation of the two territories in 1911.

Following the amalgamation of North Eastern and North Western

Rhodesia in 1911, the Northern Rhodesia Prison Proclamation, (Number 14 of 1912) was enacted followed by the Prison Regulations of 1912. These two pieces of legislation formally established the prison system in Northern Rhodesia and placed prisons under the control of the Attorney-General of the country. In 1924, the rehabilitation of offenders was announced as the official aim of imprisonment. Tailoring and carpentry workshops were established in the same year at Livingstone prison and later established at Lusaka prison in 1938. In 1947, mat-making and shoe-repairing were introduced as additional trades and African artisan instructors were employed to teach these skills. In addition, each Central Prison acquired a large garden or farm where market gardening skills were taught to inmates. Women prisoners were taught needle work by European women who were also
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Prison Visitors. By 1951, the teaching of such skills as brick-laying, brick-making and thatching had been introduced in most
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prisons as part of the rehabilitation programme.

Meanwhile, as these changes were taking place, the question of which organ of the state should administer prisons was being debated. In 1927, the control of prisons was removed from the Attorney General and placed under the Commissioner of Police. This arrangement soon proved unworkable as it stretched police resources to its limits. On 8th. November, 1938, the Commissioner of Police in a minute to the Governor of Northern Rhodesia stated:

"Prison work, which would possibly be handled fairly satisfactorily in the 1927, has grown to a stage when it is not possible for the Commissioner and his staff to cope with without serious neglect of the police force. The head of the

police should not be in charge of prisons".⁷².

Between 1937-1938, three separate reports by Sir Hebert Dowbiggin, Mr. Pim and Mr. T. C. Flynn led to the delinking of the prison system from the police.⁷³ In 1942, a Commissioner of Prisons was appointed and in 1947 the first Prisons Ordinance and Prison Rules were enacted, thus creating the Prisons Department, as it is known today, separate from the Police Force and under the Ministry of Home Affairs.⁷⁴

It has been seen that between 1927 and 1942, the prisons and the police departments were under the control of the Commissioner of Police. Today both departments are under the general control of the Ministry of Home Affairs. But despite these common features, the two departments have a poor working relationship which has adversely affected the administration of criminal justice in Lusaka. This is particularly evident in the transportation of inmates from the Remand and Central Prisons to the two court sites, as will be seen later in this thesis.

2:3 The Current Penal System.

2:3 (a) Sources of Criminal Law.

As seen in chapter 1, the B.S.A.Co administration and the subsequent rule by the Crown brought English criminal law and penal system to Northern Rhodesia.⁷⁵ Property offences under discussion as well as the sanctions attached to them are contained in the Penal Code (see Appendix 1). Other than the Penal Code, there are several individual pieces of legislation dealing with specific offences. Notable among these are the Corrupt

Practices Act 1980, The Roads and Road Traffic Act, (Cap 766 of the Laws of Zambia) and the Fire-arms Act, (Cap 111 of the Laws of Zambia). The Penal Code traces its origin from the Queensland Code, which was drafted by Sir Samuel Griffith as a model Code for colonies. It was introduced in Northern Rhodesia in 1931.

Despite the existence of the Penal Code and a host of other statutes, English common law and some statutes remain an important source of criminal law in Zambia. Section 2 of the Penal Code states:

"Except as hereafter expressly provided, nothing in this Code shall affect;
(a) the liability, trial or punishment of a person for an offence against the common law or against other law in force in Zambia other than this Code".

Similarly, the Penal Code refers the courts to English law, for instance, on the law of piracy. On matters of procedure, the Criminal Procedure Code, refers the Zambian courts to English law as again will be seen in chapter 5.

The rule regarding interpretation of the Penal Code provides more evidence of the influence of English law on Zambian courts. Section 3 of the Penal Code (Interpretation) states: "This Code shall be interpreted in accordance with the principles of interpretation obtaining in England".

This section establishes a close relationship between English and
Zambian criminal law. Its policy implication, however, is that
Zambian courts should not apply English cases mechanically, but
should do so in the light of local conditions. A perusal of
reported cases between 1980-1986 revealed that reliance on

English law in property cases is minimal. Reliance on English cases seemed to have been reduced progressively as the volume of local case law grew over the years. In the few cases in which English cases were referred to, the purpose was to get guidelines on the approach in specific and technical problems before the court. In other words, there seems to have been no desire on the part of the Zambian courts to follow general principles as laid down in their entirety in English cases.

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Further, English law applies by virtue of chapters 4 and 5 of the Laws of Zambia. Chapter 4, the English Law (Extent of Application) Act, states as follows in section 2:

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"Subject to the provisions of the Zambia Independence Order, 1964 and to any other written law:
(a) the common law and
(b) the doctrines of equity and
(c) the statutes which were in force in England on the 17th August, 1917 (being the commencement of Northern Rhodesia Order-in-Council, 1911) and
(d) any statutes of later date than that mentioned in paragraph (c) in force in England, now applied to the Republic or which hereafter shall be applied thereto by any Act or otherwise, shall be in force in the Republic".

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Chapter 5, the British Acts Extension, specifies which English legislation is referred to in paragraph (c) of section 2 of chapter 4 above. Section 2 of chapter 5 states:

"The Acts of the Parliament of the United Kingdom set forth in the schedule shall be deemed to be in full force and effect in Zambia".

Some of the Acts listed in the schedule are the Forgery Act 1913, and the Larceny Act 1916. Since 1970, however, all the above provisions, particularly those related to the applicability of common law should be interpreted in the light of Article 18 (8) of the Constitution of Zambia. This Article is discussed in

detail below.

The age limit for criminal liability in Zambia is 8 years. A person aged between 8-12 years may be found guilty of an offence if it can be proved that at the time of the offence, he knew or ought to have known that what he was doing was wrong in a moral⁸¹ as opposed to a legal sense. A juvenile offender is one aged⁸² between 8-19 years.

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2:3 (b) Punishment.

The Zambian penal system as contained in chapter VI of the Penal Code, provides the following types of punishment: (i) death, (ii) imprisonment, (iii) corporal punishment, (iv) fine, (v) forfeiture, (vi) payment of compensation, (vii) finding security for keeping the peace and be of good behaviour or to come up for judgment, (viii) deportation and (ix) any other punishment provided by the Code or any other law. Sentences included under "any other" are the suspended sentence, reconciliation, probation and Extra Mural Penal Employment (E.M.P.E.)

(i) Death Penalty.

The death penalty is mandatory for aggravated robbery using a⁸³ fire-arm. It is also mandatory for treason, certain forms of⁸⁴ murder and for some forms of piracy. There are certain exceptions to the application of this sentence. Firstly, it cannot be passed on anybody who committed a capital offence when he was under the⁸⁵ age of 18. Secondly, it cannot be passed on a pregnant woman. Instead, she is sentenced to life imprisonment. The relevant section in the Penal Code does not specify at which stage the

pregnancy should have occurred. Reading that section with section 306 of the Criminal Procedure Code, it appears that the woman must have been found pregnant at the time of conviction. But since this section is designed to protect the life of the unborn baby, it should be immaterial whether the woman became pregnant before or after her conviction. The final decision as to whether the death sentence is to be effected lies with the President⁸⁶ President, through a prerogative of mercy.⁸⁷

It has been pointed out in the United states that the existence of the death penalty has a general inhibitory effect on the judges. It reduces the likelihood of conviction. Mackey has observed that:

"...it is evident that the minds of jurors become distempered and unsettled as they rush to any conclusion, however, irrational and absurd rather than pronounce the doom of a fellow human being".⁸⁸

It was also stated in the Introduction to the British Criminal Statistics by the Home Office in 1974 that:

"In consequence of the strong proof of guilt necessary for conviction for crimes punishable by death, the proportion of acquittals for murder is higher than most other crimes and acquittals in this such cases does not imply failure to detect the perpetrators of the crime".⁸⁹

Both nation-wide and in Lusaka, a pattern seems to have emerged in which many people charged with capital aggravated robbery end up being convicted of ordinary aggravated robbery whose sentence is a mandatory 15 years imprisonment. Tables 41 and 42 reveal the infrequent use of the death penalty both nation-wide and in Lusaka between 1984-1988. As already seen in chapter 1, official figures do not show aggravated robbery. What is certain, however,

is that Zambia Police Annual Reports show that between 1984-1988, 1488 persons were convicted of robbery nation-wide of whom only 12 or 0.8% were sentenced to death. During the same period 527 persons were convicted of robbery in Lusaka none of whom was sentenced to death. Ten of the 100 interviewed offenders were in the robbery category 5 of whom were convicted of aggravated robbery. Three of the 5 offenders had been sentenced to death.

(ii) Imprisonment.

With the exception of mandatory sentences provided for certain offences, such as stock and motor-vehicle theft, the law in the majority of cases specifies only the maximum sentence and it is up to the court to impose a sentence within the range. In some cases, the imposition of a prison sentence will depend on whether or not the offence was a felony or a misdemeanour.⁹⁰ In general, the former are more serious offences and usually invite longer prison sentences while the latter may be punishable by a fine or a shorter prison sentence or both.

Imprisonment is with or without hard labour and the court specifies the form that it will take. A prison sentence takes effect from and includes the day on which it was pronounced,⁹¹ unless the court orders that it take effect prior to that day.

Table 41 shows that nation-wide imprisonment was the most preferred sentence between 1984-1988 for offences against lawful authority (Division II), for offences against the person (Division IV), for offences against property (Division V), for malicious injury to property (Division VI) and for forgery,

coining and impersonation (Division VII). The pattern for Lusaka over the same period was slightly different. As Table 42 shows, imprisonment was not the most preferred sentence for offences against the person and for malicious injury to property. Imprisonment was more consistently imposed on offenders convicted of offences against lawful authority, offences related to property, forgery and related offences. Whether this reflects a lenient sentencing attitude by Lusaka courts is not clear. It probably reflects the smallness of the Lusaka figures as compared to those of the whole country. Case records in this study show that between 1982-1989, 65.8% of the convicted property offenders were imprisoned.

(iii) Corporal Punishment.

This is a caning order and it can be imposed in the following circumstances:

(a) in the case of a person aged between 9-19 years, convicted of an offence punishable with imprisonment of less than 3 months. Caning can be ordered in addition to or in substitution of that sentence.
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(b) in cases where a person has been convicted of burglary, house breaking or theft and it is expedient in the interest of the community to do so. Similarly, caning can be ordered on any one convicted of rape, attempted rape, indecent assault on females, 93 defilement of a girl under 16 years and of idiots and imbeciles.

(c) in relation to written laws affecting the conduct of prisoners in prison or persons in reformatory or approved school, the jurisdiction of Local Courts and the prevention of cruelty

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to animals.

The sentence of caning is administered once. In other words, it cannot be carried out in instalments. The number of strokes cannot exceed 12 in the case of persons aged between 8-19 years old and cannot exceed 24 in the case of those aged above 19⁹⁵ years. The law prohibits caning of female offenders. Caning is supposed to be conducted in the presence of a medical officer who should order that it be stopped if it appears that the person cannot bear it. In that case another punishment will be imposed. The presence of a medical officer is mandatory whenever a person has to undergo more than 12 strokes of a cane.

Table 41 shows that, nation-wide, caning was ordered more frequently for offences against lawful authority, for offences against the person, for offences against property and for malicious injury to property. In the case of Lusaka, courts ordered caning more consistently for offences against lawful authority, for offences against the person and for offences against property (Table 42). As is the case with imprisonment, the differences between Lusaka and the whole country in the use of caning may lie in the respective size of the two samples. Case records in this study show that between 1982-1989, 12.1% of the convicted offenders received a caning order (see chapter 7).

(iv) Fines.

The imposition of fines is made under section 28 of the Penal Code. In some cases, the amount of the fine may be fixed, but where that is not the case, the amount of the fine which may be

imposed is unlimited but should not be excessive.

When sentences are examined together and for all offence categories, the fine emerges as the most frequently imposed sentence. Thus Hatchard, for instance, found that between 1968-1975, fines accounted for almost 60% of all sentences passed for offences under the Penal Code. Differences, however, emerge when the imposition of fines is examined against individual offence categories. Table 41 shows that nation-wide, fines were imposed more frequently for offences against public order, for offences injurious to the public in general, and to some extent, for offences against the person. As for Lusaka, courts imposed fines more frequently for offences against the person and for malicious injury to property, in addition to offences against public order and offences injurious to the public in general (Table 42). Both nation-wide and in Lusaka, courts rarely impose fines for offences against lawful authority, for offences related to property and for forgery, coining and impersonation. As will be seen in chapter 7 there are rules which prohibit courts from imposing fines on property offenders, without additional punishment. Case records in this study show that only one offender, a juvenile, was ordered to pay a fine.

(v) Forfeiture.

This punishment is ordered in connection with the offences of corruption, extortion by public officers, compounding felonies and compounding penal actions. In any of these offences, the court may order forfeiture of any property which passed in

connection with the commission of the offence. If the actual property cannot be forfeited, the court may order payment of a sum equivalent to its value. Payment of any sum ordered under⁹⁹ forfeiture is enforced in the same manner as a fine.

It is not possible to show the extent of the use of this order as neither the Police nor the Judicial Annual Reports carry this information. None of the convicted defendants in this study were given this sentence.

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(vi) Compensation and Restitution

Compensation can be ordered for any offence other than an offence punishable by death. It is generally available where a person connected with the case, i.e a prosecutor, a witness or a victim has suffered material loss or personal injury in the commission of the offence. It can also be awarded to the accused person where a case is dismissed and there is evidence that the¹⁰⁰ complaint or the charge was frivolous or vexatious. Further, compensation can also be awarded in favour of a bonafide purchaser¹⁰¹ of stolen property.

It appears that compensation does not exist as punishment for crime. Rather, it exists as a form of civil damages for those who are eligible so that they are spared of the expenses of a civil suit. At the moment compensation cannot exceed K50 (about 30p). Figures for it are not available from official statistics, but it is very rarely used, as Professor Read has pointed out:

"Compensation stands out among the available penalties that can be labelled as distinctly African in nature, but its use is so infrequent that it is virtually rendered obsolete"¹⁰².

Restitution is available especially in relation to property offences where the court orders that property recovered be restored to the owner. It is also available to an innocent purchaser who is awarded the money found on the offender upon his arrest, if any.¹⁰³

(vii) Security for Keeping the Peace.

Any person convicted of an offence not punishable by death may instead of or in addition to any punishment be ordered to enter into his own recognizance with or without sureties and in an amount the court may think fit, that he will keep the peace and be of good behaviour during the time to be specified by the court.

A convicted person may be imprisoned until recognizance is entered into, but such imprisonment cannot exceed one year.¹⁰⁴ The period specified is normally not less than three years and not more than five years. During this period, the police are supposed to keep watch over the person affected. There are no readily available figures as official records do not show the extent of the use of this sentence. None of the 538 convicted defendants in this study was bound over to keep the peace.

(viii) Deportation Within Zambia.

If a person is convicted of a felony in the High Court, that court may, in addition to or in lieu of any other punishment, recommend to the President that he be deported to any part of Zambia the President may direct.¹⁰⁵ If the person liable to be deported is serving a prison sentence, he should first serve that sentence before he can be deported.

Deportation has not been used frequently since independence. It was, however, often used during the colonial rule when it was seen as a way of ridding urban areas of criminal elements. A non-Zambian sentenced to imprisonment for certain offences may
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be deported after serving his sentence. In this study none of the convicted defendants was given a deportation order.

(ix) Absolute and Conditional Discharge.

A person convicted of an offence whose punishment is not fixed by law may be discharged either absolutely or subject to the condition that he commits no offence during a period which cannot exceed 12 months.

An absolute discharge is ordered where the court feels that the case should not have been brought to court in the first place, owing to the nature of the offence and the circumstances surrounding it, for instance theft of minor property within the family.

A conditional discharge order is usually made where the court feels that a similar disposal such as probation is inappropriate. Before making this order, the court should explain to the accused person that if he commits another offence during the period of the conditional discharge, he will be liable to be sentenced for
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the original offence.

Judicial Annual Reports do contain figures for the discharge order. The 1986 Report (the latest available) shows that 2.1% of all offenders convicted that year were discharged, absolutely or

conditionally. Case records in this study show that between 1982-1989, 2% of all the 538 convicted offenders were discharged.

(x) Extra Mural Penal Employment (E.M.P.E.)

This sentence is provided for under section 135 of the Prisons Act and it is applicable to male offenders sentenced to a prison term of not more than three months, or committed to imprisonment for non-payment of fines, compensation or costs.

In cases where E.M.P.E. is considered appropriate, the court will, with the consent of the defendant order that instead of going to prison, the defendant should perform public work outside a prison for the duration of such imprisonment. Work is provided by the district authorities to whom the defendant must report. He will then be informed of the nature, hours of work and other details.

If the defendant fails on medical grounds to perform the work, he will be taken to prison to undergo a period of imprisonment, which will be less the time spent on E.M.P.E. If on the other hand, he fails without a reasonable excuse to do the work or to report at the appointed hour or he absents himself without excuse or fails to accomplish the day's task, he will be taken to prison to serve his sentence less the period spent on E.M.P.E. In addition, he commits an offence for which he can be fined up to K100 or imprisoned for 6 months or be both fined and imprisoned. The interesting aspect of this sentence is that unlike other penalties, it is the only one contained in the Prisons Act, which strictly speaking is supposed to be enforced by prison

authorities. The prisons authorities have nothing to do with defendants ordered to do E.M.P.E, contact with the prison is only after they fail to do the work assigned to them. It is not suprising that, as will be seen in chapter 7, a number of magistrates are not aware of the existence of E.M.P.E and consequently it remains under-utilised. Official records do not carry figures for the use of E.M.P.E. This study found that between 1982-1989 only 3 out of the 538 convicted defendants (or 0.5%) were ordered to do E.M.P.E.

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(xi) The Suspended Sentence.

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The Criminal Procedure Code empowers the courts to suspend a sentence wholly or partially. The suspended sentence is applicable to all offences except those punishable by death or by minimum sentences. Certain conditions are attached to this sentence. For instance, the defendant may be required to undertake to be of good behaviour for a specified period of time. By failing to observe the condition attached, it proves that the confidence placed in the defendant was undeserved and the original prison sentence be will revived.

Like many non-custodial sentences, there are no figures available showing the extent of the use of the suspended sentence. Of the 538 convicted defendants in this study, 74 or 13.8% were given the suspended sentence as chapter 7 shows.

(xii) Probation.

111

Probation is provided for under the Probation of Offenders Act. It can be ordered in all offences except those punishable by

death or by minimum sentences. It can also be ordered where the characteristics of the offender permit, where the nature of the offence permits or where it is expedient to do so.

A probation order requires the defendant to be placed under the supervision of a probation officer for a period of not less than one year and not more than three years. As is the case with the suspended sentence, certain conditions are attached to the probation order and failure to observe them renders the defendant liable for the original offence, in addition to the new offence. Adult offenders (over 19 years of age) have to consent before this sentence can be imposed on them. Probation is rarely used. The 1986 Annual Report of the Judiciary lists 7 persons, or 1% of the convicted defendants as having been put on probation that year. In this study, 13 defendants or 2.4% of the 538 who were convicted were put on probation.

(xiii) Reconciliation.

Subordinate Courts have been empowered to promote and provide¹¹² facilities for amicable settlement of disputes. Reconciliation, however, is only available in assault cases or "offences of¹¹³ personal nature not amounting to felonies". When reconciliation is achieved, the court will order the stay of proceedings. In some cases, conditions may be attached to this disposal such as the victim being paid a sum of money in court followed by his¹¹⁴ shaking of hands with the defendant. Unfortunately, figures for the use of this disposal are not available. It appears, however, that reconciliation is rarely used. In this study it was not ordered in respect of any defendant as the offences involved

were felonies.

It may be necessary to mention two other methods of disposals which are available in the case of juvenile offenders only. The first is the approved school order which commits juveniles to an Approved School in Mazabuka, some 130 km south of Lusaka. The period of detention there is up to three years and no juvenile can be detained after his 19th birthday.¹¹⁵ Emphasis at the school is placed on vocational and academic education. Upon his release, a juvenile is placed under the care of a probation officer and he runs the risk of being sent back to the school if he does not desist from further delinquency.

The second disposal is a reformatory order which commits a juvenile to a detention centre for a period of up to 4 years. The period of detention may be extended for six months if it appears that the juvenile needs further care and training. Boys sent to the Reformatory are much older than those sent to the Approved School, but no one can be kept there after his 23rd birthday.¹¹⁶

Under normal circumstances, a juvenile is sent to the Reformatory as a last resort.¹¹⁷ The particular child should have been placed on probation, or might have been sent to the Approved School prior to the Reformatory. While at the Reformatory, a juvenile undergoes vocational and academic training. Upon his release, he is placed under the compulsory supervision of a probation officer. As is the case with the Approved School order, failure to comply with the conditions of there lease may result in the juvenile being sent back to the Reformatory.

Unfortunately, both the Approved School and the Reformatory only cater for male juvenile offenders. There is no institution for female juveniles. Female juvenile offenders have either to be placed on probation or be detained in a female prison.

From the discussion above, it appears that Zambia has a reasonably wide range of sentences which if applied in a more balanced manner could result in very few property offenders going to prison. The problem is that, as we will see in chapter 7, there are rules which prohibit the application of certain non-custodial measures such as fines to property offenders. On the other hand, resource constraints limit the use of other measures such as probation.

2:3 (c) The Position of Customary Property Crime Under the Current Penal System.

As seen above, English settlers generally recognised the existence of customary law, but they only accepted it if it passed the "repugnancy test". The status of customary criminal law was transformed after independence. Article 18 (8) of the Constitution of Zambia states:

"No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is provided in a written law".

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The above provision became effective on 24th October 1970 and since that date, only criminal law contained in the Penal Code or in other statutes is enforced in Zambia. Customary criminal law as well as common law crimes are not part of the country's criminal law since it is common knowledge that these laws are not written and cannot even be pleaded as a basis for a defence to a

criminal charge. It would appear therefore that section 2 of the Penal Code and the provisions of Chapter 4 of the Laws of Zambia, relating to the applicability of common law crimes as seen above have no force of law.

2:4 Subordinate Courts and the Magistracy.

2:4 (a) The Structure of Subordinate Courts

The structure of the court system in Zambia has been ably documented else where.¹¹⁹ It may be necessary to mention that the government policy since independence has been to integrate the Local Courts (which were established to hear cases involving Africans during the colonial period) in the country's judicial¹²⁰ system.

The Subordinate Courts are divided into three classes. Class I courts are presided over by Principal Resident Magistrates, Senior Resident Magistrates and Resident Magistrates. Class II magistrate courts are presided over by Magistrates Class II and Class III courts are presided over by Magistrates Class III. Principal Resident Magistrates, Senior Resident and Resident Magistrates are classified as "professional", while Class I, Class II and Class III magistrates are classified as "lay". There are 48 Subordinate Courts throughout the country (two of which¹²¹ are based in Lusaka) and manned by a total of 117 magistrates. The two courts in Lusaka are manned by 12 magistrates.

There are jurisdictional limits imposed on magistrates' sentencing powers. The maximum sentence a professional magistrate can impose is 9 years imprisonment. On the other hand, a lay

magistrate cannot impose a sentence of more than 5 years
122 imprisonment. In addition, various prison sentences and caning
orders imposed by lay magistrates are subject to confirmation by
the High court before they can be implemented. In the case of
fines ordered by these magistrates, they may be implemented
without confirmation as long as the case record is forwarded to
123
the High Court.

2:4 (b) The Supervision of Subordinate Courts.

There are three main ways in which the High Court exercises its
supervisory role over Subordinate Courts. Firstly, in matters of
procedure the High Court can order change of venue of the trial
if it appears that a fair and impartial trial cannot be achieved
in a particular locality. Further, a change of venue can be
ordered if it appears that questions of unusual difficulty in a
case may arise, or if a change of venue would be convenient to
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the parties. The High Court can also order that the case before a
Subordinate Court be heard by itself on its own initiative or on
an application by an interested party.

Secondly, the High Court can examine the records of any criminal
matter in order to satisfy itself as to the correctness, legality
or propriety of any decision made by a Subordinate Court. It has
the power to confirm, vary or reverse any decision and direct the
125
Subordinate Court to impose a sentence it deemes appropriate.

Thirdly, under the case stated procedure, a case may be presented
to the High Court for its opinion when one party is dissatisfied
with the ruling of the Subordinate Court either on a point of law

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or on jurisdiction. A case stated sets out the charge, submissions made by the parties, the decision of the Subordinate Court, and the questions which any of the parties wish to submit to the High Court for its ruling.

Other than the above supervisory procedures, cases may reach the High Court from the Subordinate Court through preliminary inquiry¹²⁷ or through appeal procedures¹²⁸. In the case of an appeal, it can be made on the questions of law, fact or mixed law and fact. It can also be made against sentence for offences whose sentence is not fixed by law.

Since 1976, the Director of Public Prosecutions can appeal to the High Court on the ground that the lower court's decision was¹²⁹ erroneous in law or was in excess of its jurisdiction. Although this may result in the conviction of a previously acquitted defendant (i.e if the High Court quashes an acquittal verdict and orders a re-trial), it may be justified on the grounds of public interest. It is common knowledge in Lusaka (and nation-wide) that judges are over-worked and have little time for the supervision of Subordinate Courts. Most irregularities and inconsistencies in the decisions of magistrate's courts therefore are not rectified. The D.P.P must therefore supplement the role of judges in the supervision of magistrates.

The appeal procedure is more favourable to the defendant than the case stated method. While the case stated method is only concerned with questions of law and jurisdiction, the appeal procedure covers questions of law, fact, mixed law and fact and

sentence. Besides, a Subordinate Court may refuse to state a
130 case, which does not apply to appeals. Many interviewed offenders in this study informed the writer that whilst they were aware of the existence of the appeal procedure, they were ignorant about the existence of the case stated method.

The administration of criminal justice both nation-wide and in Lusaka is plagued with delays which affect the quality of justice being dispensed. There are cases, for instance in which by the time the appeal is heard, the defendant has already served his
131 entire sentence. Delays in the hearing of appeals is a major
132 reason why many defendants do not make use of the appeal process. The other problem which affects the quality of magisterial justice is the shortage of court rooms. At Lusaka's Chikwa Road courts, six magistrates share three court rooms. Most magistrates have to rush through their cases in order to give a chance to their colleagues.

2:4 (c) The Training of Magistrates.

(i) The Lay Magistrates.

Before independence, Provincial Commissioners performed judicial functions in addition to their normal administrative duties. In 1965, the Government policy on the matter changed and formal training of magistrates began that year.

For any one to be selected for training as a "lay" magistrate, he must be a Zambian citizen of a minimum age of 25 years. In addition, he must have five "O" levels (including English Language), a record of successful employment and must have no

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criminal record.

Initially an advertisement calling for applications is placed in the press. Candidates who qualify under the criteria above are short listed and interviewed by the Judicial Service Commission.¹³⁴ The successful candidates undergo a magistrate's course at the National Institute of Public Administration, (N.I.P.A.) in Lusaka.¹³⁵ Up to 1986, the course was conducted in two separate stages- the Basic Course which ran for a year and catered for beginners and the Advanced Course which lasted for three months and catered for serving magistrates as a refresher course. As can be seen from Appendix 6, the Basic Course emphasised the criminal aspect of magisterial duties. On the other hand, the Advanced Course as seen in Appendix 7 emphasised the civil aspect of magisterial functions.

Between 1965 and 1968 only two Advanced Courses were conducted involving a total of 20 magistrates. On the other hand a total of seven Basic Courses were conducted during the same period,¹³⁶ involving some 121 magistrates.

In 1986, a decision was taken to merge the two courses, elevate the new course to a diploma and expand its duration to two years. There were many reasons which prompted the merger. Firstly, the duration of the Basic Course was inadequate and did not give sufficient training to magistrates as it was not possible to cover all subjects thoroughly in one year.¹³⁷ Secondly, the inability to run the advanced course was a serious handicap to magistrates in their handling of civil matters. As seen above, it

was this course which covered the civil aspects of magisterial duties. It became increasingly difficult to secure the attendance of magistrates, as judicial functions could not be suspended for such a long period as three months.

The basic qualifications for applicants, the method of recruitment and other aspects of the course have, however, not changed. But as Appendix 8 shows, the new Diploma course is certainly an improvement on the old syllabus as contained in Appendices 5 and 6. The Diploma course includes a number of new and important subjects such as Admission of Guilty Proceedings, Juvenile Proceedings, Legal Profession and Book-Keeping and Accounts. It also includes useful substantive law subjects such as Administrative Law, Commercial Law, Family Law, Succession and Land Law.

(ii) The Professional Magistrates.

Professional magistrates are qualified legal practitioners. Like all other lawyers, they undertake a three year degree course in the Law School at the University of Zambia, after having spent a year in the School of Humanities and Social Sciences. In the first year students take five courses, namely, Law of Torts, Law of Contract, Criminal Law, Constitutional Law and Legal Process. In the second year, they take Law of Evidence, Property Law and Succession, Commercial Law, Administrative Law, Family Law and a practical course called Moot Court. At the third and final level students take four taught courses and an Essay. The Essay is compulsory and so are two other courses namely, Jurisprudence and Business Associations. There are a number of optional courses

from which students are expected to choose two subjects. These are: International Law, Conflict of Laws, International Trade and Investment, Labour Law, Criminology and Taxation. In order for a student to be awarded a Bachelor of Laws degree, he must pass all the 15 courses and obtain a minimum of a c+ grade in the Essay course.

At the end of the three years in the Law School, successful candidates who wish to practise law or to become professional magistrates enrol at the Law Practice Institute for the Bar examinations. The emphasis at the Institute is on the acquisition of practical skills.¹³⁸ The course consists of the following subjects: Conveyancing and Legal Drafting, Probate and Succession, Commercial Transactions, Company Procedure, Civil Procedure I and II, Domestic Relations, Criminal Procedure and Law of Evidence.

The course runs for one year during which students are attached to legal firms and Government Departments. A candidate must pass all the ten courses before he can be admitted to the Bar. The Council of Legal Education sets stringent admission requirements. For instance, if at the first sitting a candidate passes less than four courses, he must re-sit all the subjects at the next sitting including those which he passed. Upon a successful completion of the course, a candidate intending to join the magistracy may be appointed Resident Magistrate. If he was a lay magistrate he is elevated to professional ranks and appointed Resident Magistrate.

Some aspects of the training of magistrates need to be re-examined. Even though the new Diploma course looks comprehensive enough to produce able magistrates, is unlikely to do so if it fails to embody an element of continuing education in its curriculum. This is crucial if sentencing has to keep pace with the changing patterns of crime and public attitude to criminal behaviour and punishment. Continuing education may take many forms. In this case the most effective and relatively cheaper to run could probably be a seminar series. Three or four meetings a year, at which magistrates would gather and exchange views and experiences and invite experts to participate, would be adequate. Consideration should also be given to the question of raising the minimum entry age for lay magistrates from 25 to, say, 30 years of age as is the case in Tanzania, for example. This would give new magistrates an added experience of life and increase their level of maturity.

Efforts should equally be directed at the creation of a clear career pattern in which lay magistrates should eventually take a law degree and Bar examinations so that they can join the professional ranks. Experience shows that the few magistrates who take this route perform better than those who occupy the bench straight after the Law School and Bar examinations.

The appointment of professional magistrates also needs re-appraisal. Most magistrates appointed this way are young, their average age being about 23 years and therefore inexperienced. The proper route should be that after admission to the Bar, those intending to join the bench (if they are not lay magistrates),

should serve at the Attorney General's Chambers, or at the Legal Aid Department, or in private firms for at least three years. In both Sierra Leone and Nigeria, for example, only lawyers with not less than three years standing at the Bar may be appointed

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magistrates.

2:5 The Prosecution System.

In Zambia, prosecutions may be instituted by an individual appearing personally or through his counsel or by a public prosecutor appointed by the D.P.P. ¹⁴¹ Prosecution by an individual is rare mainly for two reasons. Firstly, the expense involved such as the tracing and summoning of witnesses, their travel and accommodation, should they happen to reside far from the place of hearing, cannot easily be afforded by many people. Secondly, it has been generally accepted by the people that prosecution is part of the Government's responsibility for maintaining law and order.

Prosecution by a public prosecutor may be conducted by either State Advocates from the Attorney General's Chambers whose practice of law is regulated by the Legal Practitioner's Act ¹⁴² or by police prosecutors. The former normally conduct their prosecutions in the High Court or in the Supreme Court while the ¹⁴³ latter prosecute in the Subordinate Courts. For the purpose of this study, we confine ourselves to police prosecution in the Subordinate Courts.

The police prosecution branch was formed in 1962 as a result of a statute enacted in 1961. ¹⁴⁴ By the provisions of that statute, all

police officers of or above the rank of Assistant Inspector were vested with the powers of a public prosecutor. At that time, however, very few Africans were able to qualify as public prosecutors because the majority of them were below that rank. In 1964 the new Government of the Republic of Zambia, passed
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another law which repealed the 1961 statute named above and varied the qualifications for one to be appointed as a public prosecutor from that of Assistant Inspector to one of Sub-Inspector. This measure was necessary so as to enable more Africans in the Police Force to perform prosecution work.

In order for one to qualify as a police prosecutor, he has to undergo a prosecutor's course, having previously been trained as a police officer for a period of nine months. The prosecutor's course also runs for nine months and it covers the following subjects: Criminal law, Criminal Procedure, Criminal Evidence, General Principles of Law (as an "O" level subject), Use of Statutes, English (as an "O" level subject for those without it),
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Contract, Tort and Humanism, the country's official ideology.

The police prosecution branch is headed by an Assistant Commissioner of Police who is a qualified legal practitioner. He is based at the Police Force Headquarters in Lusaka but he has other offices in Ndola to cater for the northern half of the country and in Lusaka to cater for the southern half.

In theory, the police prosecutors are supposed to work closely with State Advocates to whom they must turn for advice and guidance. But in practice, there is little cooperation between

them, the main reason being that there is a serious shortage of State Advocates. It is only in complicated and serious cases such as frauds in which the police seek advice.

2:6 Legal Representation.

The Legal Aid Department was established in 1967, by the Legal Aid Act, 1967 (Cap 546 of the Laws of Zambia). The Act provides legal aid to persons charged with "specified offences", which do not include property offences. For other offences, including property offences, legal aid was until 1980, available at the discretion of the magistrates. By the provisions of the Specification of Offences (Revocation) Order of 1980, legal aid services in the subordinate courts, are available only at the discretion of the Director of Legal Aid.

Due to manpower constraints, very few defendants appearing in the subordinate courts have access to legal aid. In most cases, it is the Legal aid Assistants, i.e, students undertaking the Bar examinations who appear. Thus the general view is that the legal aid services offered in these courts are poor. But in both the High Court and the Supreme Court, legal aid is more readily available.

An earlier study found that only 3.9% of defendants were legally represented. In this study, only 34 or 3% of the 1129 defendants whose case records were examined had legal representation. As for the 100 interviewed offenders, 7 or 7% were legally represented, 5 of whom were convicted of aggravated robbery tried by the High Court where legal aid services are more easily available.

With so many defendants conducting their own defence, many cases are not properly and fully argued and that may have an adverse effect on the quality of judgments in magistrate's courts. For instance the line of cross-examination by many offenders who conduct their own defence is invariably designed to show that the prosecution have a wrong person in the dock by trying to cast some doubt about their identity. Other matters such as the admissibility of evidence or possible defences are not raised.

2:7 Conclusion.

It has been shown in this chapter that customary criminal law was based on simple and straight-forward rules and procedures. Both the law and procedures were easily understood as they were embodied in the every-day language of the people. These factors facilitated public participation in the criminal process. Within that framework, punishment had to be geared towards the promotion of social relationships and the avoidance of animosity. Hence compensation was the most appropriate remedy to achieve that goal. It was therefore not at all surprising that when the present criminal law along with its procedures and remedies were introduced by the colonial power, Africans received them with considerable resentment.

It is of interest that whilst the colonial power tolerated customary criminal law, but subjected it to the repugnancy test, the independent government has abolished it altogether. The precise meaning of Article 18(8) of the Constitution is not clear, but its implications appear to be very wide. It abolishes both the procedural and substantive customary criminal law as well

as the customary remedies as long as these are not incorporated in any of the existing criminal statutes.

The reasons which prompted the government to abolish all unwritten customary criminal law and procedure are not obvious. It could not have been that it treated offenders harshly because by 1970 trial by ordeal as well as the amputations had died out completely. Neither was the reason that it lacked uniformity on account of its allegedly being too varied and uncertain across the country. As seen above, there were broad similarities in what were regarded as crimes and in the way different tribal groups treated offenders. In any case, lack of uniformity or the uncertainty of law cannot be a valid ground for its abolition for that problem could be solved by say, codification of law, if only the will to do so is there.

It appears that there are two main reasons why customary criminal law has been abolished. The first is that dualism of law (i.e the existence of customary law side by side with the received English law), was inconsistent with national unity, a policy¹⁵¹ which the new independent government was vigorously promoting. National unity became synonymous with uniformity of criminal law enforced in an integrated judicial system.

The second reason has to do with the establishment of the presidential system of government, whose conception of power was the subjection of all institutions to its control. One of the first things the Crown administration embarked on after taking control of the territory, was the creation of Native Authorities,

an institution in which chiefs became part of the government machinery. They were given limited autonomy over local issues subject to the ultimate control by District and Provincial Commissioners. Through the Native Courts, chiefs exercised limited judicial powers within the frame-work of the repugnancy doctrine.

As a result of their position, chiefs were regarded by some nationalists as collaborators. It was not therefore surprising that after independence, chiefs were stripped of their judicial powers though they retained limited administrative powers. Since 1972, by virtue of the Chiefs Act, chiefs hold their positions at the president's ¹⁵²pleasure. The Act has abolished Native Authorities and the Native Courts. The introduction of a strong presidential government was incompatible with the existence of an autonomous or strong chieftancy. Besides, criminal law and its enforcement are instruments of power which in a strong presidential government such as the Zambian one, between 1964-¹⁵³1991, could not be divisible.

It should be noted, however, that the policy of total integration of the courts, the uniformity of criminal law and the popular acceptance of the current procedures and remedies (all of which were the envisaged results of the abolition of customary criminal law) have not been realised. Practically, the Local Courts still operate outside the mainstream judicial system, despite the existence of the appeal procedure to the Subordinate Courts and ultimately to the Supreme Court. Evidence for this abounds. In the first place, the denial of audience to counsel in those

courts has tied them to the traditional or customary society or
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to issues of the "local" nature. This is reinforced by the fact
that the presiding justices in the Local Courts do not need any
training in law, but are presumed to know customary law by virtue
of their station in life, in the same way that chiefs and their
cousellers had been. Secondly, although the vast majority of their
business is civil, people who prosecute in the Local Courts are
not fully qualified prosecutors, and unlike their counterparts in
the Subordinate Courts, they have had no training in
prosecution. Besides, unlike in the Subordinate Courts,
proceedings in the Local Courts are less technical and are
conducted in local languages. In other words, strict rules of
evidence are not adhered to and hearsay evidence, for instance,
is admissible.

The present criminal law and procedure as well as the remedies are
substantially the same as they were when they were introduced in
the 1930s. Later in this thesis we shall see that some
consumers of criminal justice have not fully accepted certain
aspects of the the present criminal justice system. The main
reason for this is that certain procedures are found to be too
technical and difficult to understand while the available
remedies are unacceptable because they do not benefit the
complainant (chapter 5, 6 and 7). In so far as the remedies and
procedures were concerned, some Africans expected the independent
government to revive certain traditional methods of dispute
155
settlement.

This chapter has also shown that the Zambian Police Force was not

created as a civil unit, but it developed as a military force with the primary aim to perform military duties. Its organization and training emphasised its military and para-military outlook. Policing therefore, was a secondary function. Today, the Zambian Police Force has not cast aside this military outlook as they still maintain police camps and emphasise military drill in police training (chapter 4). Similarly, no serious effort has been made to harmonise police-public relations which were already under strain during the colonial period. Above all, the question of the general orientation of the Police Force together with the system of accountability has not been addressed. Later in this thesis, we shall see how all these factors have adversely police functions.

On the other hand, it has been shown that the prison system did not exist in the territories later named Northern Rhodesia (now Zambia) before they were introduced by the colonial power. But despite the lack of historical roots in Zambia, it will be seen later in this thesis that imprisonment is the most widely imposed punishment on property offenders in Lusaka (chapters 6 and 7). The programme of rehabilitation of offenders, introduced in 1924 is still, officially, the proclaimed purpose of imprisonment. Several decades later, little has changed as it runs basically the same programmes without any effort to assess their effectiveness or to make any improvements to them. As we shall see in chapter 8, the rehabilitation of offenders as a crime prevention strategy has not had any significant effect.

The other problem hampering the smooth administration of justice

in Lusaka magistrates' courts is the lack of supervision of these courts by the High Court, despite the existence of elaborate procedures under the Criminal Procedure Code. Judges have little time for this task, which is seen as being somewhat outside their normal line of duty. It is only in circumstances where a particular case has attracted public interest that a judge may call for the record and re-examine it.¹⁵⁶ The problem of supervision, coupled with the inexperience of most of the bench on the one hand and the lack of legal representation on the other, have generally affected the quality of justice being dispensed in the magistrates' courts. It will be seen later in this thesis how the two problems have adversely affected sentencing in these courts. (chapters 6 and 7).

Lastly, it should be mentioned that the received English criminal law and punishment is not necessarily unsuitable for Zambia. The problem, however, is that it was received without its "discipline", i.e, without the support structures such as the resources for training, an independent and assertive judiciary, an informed public opinion, police accountability, sound police-public relations, probation system, etc. The general lack of resources, coupled with the traditional beliefs and practices of criminal justice have rendered the received criminal law and punishment generally unworkable as will become evident later in this thesis.

Notes

- 1 A. L. Epstein, "Judicial Techniques and the Judicial Process: A Study in African Customary Law" The Rhodes-Livingstone Papers, No. 23, Manchester, 1954, 2.
- 2 A.N. Allott, "Evidence in African Customary Law", in E. Cotran and N.N. Rubin (eds), Readings in African Law, London, 1970, 88.
- 3 T.O. Elias, The Nature of African Customary Law, Manchester, 1956, 229.
- 4 P.B. Burton, Larceda's Journey to Kazembe in 1798, London, 1873, 76, 117. See also I. Cunnison, The Luapula People of Northern Rhodesia, Manchester, 199, who says: "Any ordeal was called mwafi. The expression to undergo an ordeal is kunwo mwafi, (to drink mwafi). Mwafi is a tree (*erythrophloeum guineense*)...", 182 foot note number 1.
- 5 M. Chanock, Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia, Cambridge, 1985, 87.
- 6 In Southern Rhodesia (now Zimbabwe) Mittlebeeler has reported that the boiling water test was "a very common form of ordeal in which a suspected person was forced to plunge his arm into a pot of boiling water to lift a stone or some other object. If his arm showed no marks of injury, he was considered innocent". E.V. Mittlebeeler, African Customary and Western Law: The Development of Rhodesian Criminal Law for Africans, New York 1976, 19.
- 7 M. Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia (Zambia), Manchester, 1955, 98-99.
- 8 M. Chanock, op cit, 91. Among the Ila of Southern Zambia, the practice was that if an important person died, everyone in the village wished to drink the mwafi to show that they had nothing to do with the death. See E.W. Smith and A.M. Dale, The Ila Speaking People of Northern Rhodesia, London, 1920, (New York version, 1968, 123).
- 9 See M. Chanock, op cit, 1984, 91-92.
- 10 A.L. Epstein, op cit, 1.
- 11 Ibid, 1.
- 12 R.S. Canter, op cit, 266.
- 13 A.L. Epstein, op cit, 1954, 23.
- 14 R.S. Canter, op cit, 266.
- 15 W.J. Burchell, Travels in the Interior of Southern Africa, Vol II, London 305, 308, quoted by A.C. Myburgh, Indigenous Criminal

Law in Bophuthatwana, Pretoria, 1980, 49. In Botswana, Schapera has reported that "while a cattle thief may be killed, his hands may be severed or mutilated by cutting or burning instead or he could be flogged". I.Schapera, "Law and Custom" in I.Schapera (ed) The Bantu Speaking Tribes of South Africa, London, 1937, 1, 210, 207, 271. The methods of execution were burning, spearing and drowning.

16 R.F.Burton, op cit, 121. See also M.Chanock, op cit, 128.

17 British South Africa Co. Report of the Administration of Rhodesia, 1900-1902, London, 1903, 427.

18 Gluckman, op cit, 105.

19 Zambia National Archives (Z.N.A) N.R G2, quoted by Chanock, op cit, 75.

20 M.Chanock, ibid, 75. See also C.C Roberts, Tangled Justice, 1937, 64, 79, 84-85.

21 T.O.Elias, op cit, 1956 121,

22 M.Chanock, op cit, 75.

23 I.Cunnison, op cit, 183.

24 B.Goldin and M.Gelford, African Law and Custom, Cape Town, 1973, 265.

25 See also A.C.Myburgh, op cit, 19, who refers to this principle as defence of necessity or emergency under Bophuthatswana criminal law.

26 See Goldin and Gelford, op cit, 266.

27 Personal communication with Mr. F.Bwalya, a former diplomat, 10th. September, 1989.

28 British South Africa Co. Reports, op cit, 404.

29 Rule 6 of the Native Commissioners' King's Regulations stated that: "Every Native Commissioner shall have jurisdiction to hear and determine in a summary manner, every offence within the local limits of his jurisdiction...". Rule 7 specified the type of punishments that were to be imposed, the most prominent of them being imprisonment, fines and whipping.

30 op cit, 424, 418.

31 See Lord Hailey, Native Administration and Political Development in Tropical Africa, Nendeln/ Liechtenstein, 1979, 283.

32 The term "Native" was defined in the North Eastern Rhodesia

Order-in-Council, 1900 as "any native of Africa, not being of European or American race or parentage".

33 Section 5 of that Proclamation stated that: "Nothing in this Proclamation shall deprive the High Court of the right to observe and enforce the observance or deprive any person of the benefit of any law or custom existing in the Territory such law or custom not being repugnant to natural justice and good government", as amended by the High Court Proclamation Nos. 15 of 1913, 20 of 1914 and 2 of 1916.

34 H.F.Morris, "The Framework for Indirect Rule in East Africa", in H.F.Morris and James S.Read, Indirect Rule And The Search For Justice, London, 1972, 3.

35 K.Bradley, Native Courts and Authorities in Northern Rhodesia, Manchester, 1950, 10. See also Lord Hailey, op cit, 284. Other statutes over which Native Courts had jurisdiction were: Alien Natives Registration Ordinance, Bush Fires Prevention Ordinance, Cattle Diseases Ordinance, Control of Drugs Ordinance, Game Ordinance, Arms and Ammunition Ordinance, Roads and Vehicles Ordinance, Public Health Ordinance and Dangerous Drugs Ordinance. For other statutes administered by Native Courts in Northern Rhodesia in the 1950s, see M.Chanock, op cit, foot note 16, 269.

36 Colonial Office Annual Report on Northern Rhodesia for the Year 1947, HMSO, London, 1948, 30. After 17th. August, 1911, the Territory acquired its own legislature and started enacting its own legislation.

37 Lord Hailey, op cit, 288. See also A.L.Espstein, op cit, 1954, 3.

38 James S.Read, "Customary Law under the Colonial Rule", in H.F.Morris and James S.Read, op cit, 175.

39 [1952] R & N 169.

40 R V Mubanga and Makungu, foot note 39, at 179.

41 5 N.R.L.R. 148. [1948].

42 R V Matengula, foot note 41, at 151, 154.

43 op cit, 180.

44 Lord Hailey, Native Administration in British African Territories, London, 1950, 1979 edn, quoted by Chanock, op cit, 119.

45 Chanock, ibid, 118.

46 Dispatch by Sir Banard Bourdillon, Governor of Uganda to the Secretary of State, printed in the Annex to the Bushe Report on the Administration of Justice in Kenya, Uganda and Tanganyika

Territories in Criminal Matters, Cmd. 4623, 1934, 131-132 quoted by James S.Read, "The Search For Justice" in H.F.Morris and James S.Read, op cit, 298-299.

47 The Bushe Report, ibid, 57.

48 Op cit, 104.

49 Ibid, 105.

50 Sections 2(6) and 3.

51 Chanock, op cit, 229. It has also been pointed out that unrecognised tribal courts continued to function during B.S.A.Co. rule. See M.Chilundo, "Selection of Adjudicators and Composition of the Local Courts in Zambia", in The Report, of the African Commonwealth Magistrates' Seminar on Legal Education, op cit, 117.

52 W.Clifford, Criminal Cases in Urban Native Courts of Northern Rhodesia, Lusaka, 1960.

53 See W.Clifford, Crime in Northern Rhodesia, Rhodes-Livingstone Communication No. 18, Lusaka, 1960, 98.

54 R.H.Harrington, "The Tamimg of North Eastern Rhodesia", Northern Rhodesia Journal, 3; (1955), 17, 18.

55 W.V.Brelsford, "Early Days", in W.V.Brelsford, (ed), The Story of Northern Rhodesia Regiment, Lusaka, 1954, 2.

56 Ibid, 3.

57 Ibid, 9-11.

58 Ibid, 4.

59 Ibid, 16.

60 Op cit, 452.

61 Ibid, 453.

62 Brelsford, op cit, 23.

63 Colonial Office Annual Report on Northern Rhodesia for 1947, op cit, 31.

64 Ibid, 31.

65 This was the case in most British dependencies. But Clifford seems to take a different view. He says: "Prisons for offenders are not an entirely Western importation to Africa. Anthropologists and early administrators have described prisons and practice of incarcerating offenders among some of the large and more politically organised tribes especially in West Africa.

But obviously, to develop in any way, prisons needed tribes of both a certain size and of a settled way of life". W.Clifford, An Introduction to African Criminology, Nairobi, 1974, 188. Support for this view is found among the Yoruba where Talbot reported the pre-British existence of prisons. He says: "...every chief or a big man had a prison or a cell in which he kept his own criminals for such offences as disobedience or drunkenness etc. Those who had committed serious crimes, however, were usually detained in the prison of the Ogbuni society". See P.A.Talbot, The Peoples of Southern Nigeria, London, 1926, Vol III, quoted by T.O.Elias, op cit, 262.

As for Zambia Clifford has also reported that prisons did not exist before they were introduced by the colonial power. See his "Zambia", in A.Milner (ed) op cit, 1969, 241-242 where he says: "...where the safety of the community was involved, as in cases involving witches or persistent offenders, death or exile was the usual penalty. In other circumstances, the law was dominated by the idea of compensation to counter-balance the loss and restore amity in the local residential group. Prisons were unknown and even murder, assault, and property damage could be redressed by compensation and only provoked penal sanction when their effects threatened the stability of the community as a whole".

66 Regulation Number 2 of 1908, published in the Gazette dated 20th. February, 1908.

67 Address by the Hon. F.M.Chomba, MP, Minister of Home Affairs to the House of Chiefs on 11th. November, 1981, reported in the Official Verbatim Report of the Minutes of the House of Chiefs Meeting, Monday. 16th. November -Friday 20th. November, 1981, Lusaka, 1984, 30.

68 I.Graham, "A History of the Northern Rhodesia Prison Service", The Rhodesian Journal, 5; (1962-1964), 549. See also W.Clifford, "Zambia", in A.Milner, (ed), op cit, 1969, 243. It is not specified in literature whether the fee was per month or per year. But considering the value of money at that time, the fee was probably payable per year.

69 I.Graham, ibid, 549.

70 Colonial Office Annual Report on Northern Rhodesia, op cit, 1947, 32.

71 Colonial Office Annual Report on Northern Rhodesia for the Year 1951, HMSO, London, 1952, 53.

72 See I.Graham, op cit, 551.

73 The Dowbiggin Report on Northern Rhodesia Police Force, (1937); The Pim Report on the Financial and Economic Position of the Prison System in Northern Rhodesia, (1938) and The Flynn Report on the Prison System in Northern Rhodesia and Recommendations for Reorganization, (1938).

74 See W.Clifford, op cit, 1969, 242.

75 See J.Hatchard, op cit, 1984, 163 and also K.T.Mwansa, op cit, 1986, 23.

76 See section 73 of the Penal Code which states that: "Any person who is guilt of piracy or any crime connected with or related or akin to piracy is liable to be tried and punished according to the law of England for the time being in force".

77 Before this section was amended in 1972, it was wider as it included the following words immediately after the current section:"...and expressions used in it shall be presumed so far as it is consitent with their context and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith".

78 See for instance, Kunda V The People, [1980] Z.R. 100, a case of house breaking in which the English case of R V Aves, (1950) Crim App,159 was cited in order to throw light on the doctrine of recent possession; Tepula V The People, [1981] Z.R.304, a case of stock theft in which reference was made to R V McNally, (1954) Crim App Rep 90 and R V Plummer, (1902) 2 K.B, 339 in order to throw light on question of plea retraction by the acussed person; Sooli V The People, [1981] Z.R, 298 a case of theft by servants in which reference was made to R V.Lawson 36, Crim App App 30 on the question of the test applicable to the general deficiency charge and Munalula V The People, [1982] Z.R 158 in which reference was made to R V Manning, [1968] Crim.L.R , R V Fraser and Warren, 40 Crim App Rep, 160; R V Thompson, 64 Crim App Rep 96; R V Golder, 64 Crim App Rep 5; R V Harris, 20 Crim App Rep 144 and R V White, 17 Crim App Rep 59 on the question of rules applicable to and the value of evidence of a hostile witness.

79 Act No. 4 of 1963.

80 Act No. 11 of 1912 as amended in 1968 as Act No. 58.

81 Section 14 of the Penal Code.

82 Section 2(1) of the Juveniles Act (Cap 217 of the Laws of Zambia).

83 For a further discussion on aggravated robbery and the death penalty see K.T.Mwansa, "The Definition of a Fire-Arm in Aggravated Robbery: Johny Timothy and Feston Mwamba V The People" Zambia Law Journal, 16 1984, 85.

84 Sections 43(1), 201 and 73 of the Penal Code. As already seen above, the English law of piracy applies to Zambia (see note 76). Since the death penalty has been abolished in England, it follows that piracy is no longer a capital offence in Zambia.

85 See sections 25(2) and 24 (4) of the Penal Code.

- 86 See A.Milner, The Nigerian Legal System, London, 1972, 323.
- 87 See Articles 59 and 60 of the Constitution of Zambia.
- 88 P.C.Mackey, "Inutility of Capital Punishment" in H.A.Bedan and C.M.Pierce (eds) Capital Punishment in the United States, New York 1975, 50.
- 89 United Kingdom, Report of the Select Committee on Capital Punishment, HMSO, 1936.
- 90 Section 4 of the Penal Code defines a felony as "an offence punishable, without proof of previous conviction with death, or with imprisonment with or without labour for three or more years". It defines a misdemeanour as "an offence which is not a felony".
- 91 Section 37 of the Criminal Procedure Code. As will be seen in chapters 6 and 7, in most cases, imprisonment takes effect from the day of arrest for offenders remanded in custody.
- 92 Section 27(2) of the Penal Code.
- 93 Section 27(3) of the Penal Code. See also the First Schedule to the Penal Code.
- 94 Section 27(4)(a-d) of the Penal Code
- 95 Section 27(5)(b) of the Penal Code.
- 96 Section 28(a) of the Penal Code.
- 97 J.Hatchard, op cit, 1984, 175. See also K.T.Mwansa, op cit, 1986, 23.
- 98 See The Corrupt Practices Act, 1980 and sections 113(1) and 113(2) of the Penal Code.
- 99 Section 29 of the Penal Code.
- 100 Section 175 of the Criminal Procedure Code.
- 101 Section 175(2) of the Criminal Procedure Code. See also section 30 of the Penal Code.
- 102 J.S.Read, "Crime and Punishment in East Africa: The Twilight of Customary Law" Howard Law Journal Vol 10 (1964) 166. See also A.L.Epstein, "Some Aspects of the Conflict of Law and Urban Courts in Northern Rhodesia" in Human Problems in British Central Africa, The Rhodes-Livingstone Journal No. 12, Manchester, 1951, in which he says that: "Compensation to cool one's own heart, rather than punishment seems to ... have been the guiding principle", 36. Later he says that: "...it is clear that many Africans see in the matter of compensation one of the major differences between English and African customary

concepts", 36.

103 Section 180 of the Criminal Procedure Code.

104 Section 31 of the Penal Code.

105 An interesting aspect of this sentence is that it can also be inflicted on an unconvicted person as long as there is sworn evidence that he is likely or is about to commit a breach of the peace, see sections 31(1) and 34(2) of the Penal Code.

106 The Annual Report of the Judiciary contains SC Form 35 which bears a column entitled "Deportation Orders" but which for all available annual reports is blank.

107 Section 33(1) of the Penal Code.

108 Section 41 of the Penal Code.

109 Section 135 of the Prisons Act, (Cap 134 of the Laws of Zambia).

110 See section 16.

111 Chapter 147 of the Laws of Zambia.

112 Section 8 of the Criminal Procedure Code.

113 Ibid.

114 I.Clegg, P.Harding and J.Whetton, op cit.

115 See sections 78 and 86 of the Juveniles Act.

116 See sections 104 and 105 of the Juveniles Act.

117 See J.Hatchard, op cit, 1984, 181 and also K.T.Mwansa, "Juvenile Delinquency in Zambia: The Law and Parental Role in Its Control", in K. Osei-Hwedie and M.Ndulo (eds) Studies in Youth and Development, Lusaka, 1989, 336.

118 In 1966, the Zambian Parliament enacted the Zambia Independence Order (Prescribed Date) Act, 1966 whose section 2 provided that 24th October, 1970 shall be date on which Article 18(8) of the Constitution of Zambia shall come into force.

119 See for instance, F.O.Spalding, E.L.Hoover and J.C.Piper, op cit, and R.Purdy "The Zambian Judicial System: A Review of the Jurisdictional Law" in M.Ndulo (ed), op cit, 67.

120 In the Annual Report of the Judiciary and Magistracy, 1964, the then Chief Justice was reported as having said: "The Government attached the greatest importance to the speed and effective integration of the Native Court system within the

judiciary", 4.

121 Section 7 of the Criminal Procedure Code and the "Introduction" to the 1985 Annual Report of Judiciary.

122 See section 9 of the Criminal Procedure Code. See also section 54 of the Subordinate Courts Act (Cap 45 of the Laws of Zambia which states: "Every magistrate and every officer attached to a magistrate shall be subject to the orders and directions of the High Court; and every proceeding before a magistrate shall be subject to the directions and control of the High Court".

123 Ibid.

124 Section 80 of the Criminal Procedure Code.

125 Sections 337 " " "

126 Sections 341-350 " " "

127 Section 338 " " "

128 Sections 10,222-224 and 321 " "

129 Section 4 of Act no. 30 of 1976.

130 A refusal to state a case, however, entitles the applicant to seek an order of mandamus from the High Court requiring the Subordinate Court to do so. See sections 343 and 344 of the Criminal Procedure Code.

131 See for instance, Bwalya V The People, S.J.Z. No. 6, 1979 in which the defendant had already served his entire five year prison term before the appeal was heard. The Supreme Court found his conviction unsafe and quashed it.

132 See for instance, Lubasi, Burglary, interviewed on 19th September 1989, Mwelwa, Burglary, interviewed on 5th October 1989 and Kangwa, Theft, interviewed on 13 th Sptember 1989.

133 In Tanzania, the minimum age for admission to a similar course is 30 years for male and 25 years for female applicants. See G.Rwelengera "Selection and Training of Primary Court Magitrates: Challenge to the Tanzanian Situation", in The Report African Commonwealth Magistrate's Seminar on Legal Education for Magistrates..., op cit, 97.

134 A.G.G.Campbell, "The Training of Magistrates in Zambia", ibid, 140.

135 The course is very popular. In 1980 for example, 1,400 applicants were received for only 20 available places on the course. As for 1982 and 1986 intakes over 2,500 applications were received for only 24 places available for each intake. Candidates come from a diversity of backgrounds: public and private sector, rural and urban areas etc, with an average age of 30 years.

Personal Communication with Mr. E.J.Swarbrick, Head of the Legal Department under which the magisterial training falls at N.I.P.A, 18th September 1987. See also A.G.G.Campbell, ibid, 140.

136 E.J.Swarbrick "The Selection and Training of Primary Court Adjudicators", ibid, 128.

137 See also F.O.Spalding et al, op cit, 125.

138 M.Ndulo "Legal Education in Zambia: Pedagogical Issues" in K.Osei-Hwedie and M.Ndulo (eds) op cit, 1989, 218.

139 See G.Rwalengera, in The Report of African Commonwealth Magistrates Seminar on Legal Education... op cit, 97.

140 For Sierra Leone, see N.D.Alhadi, "The Jurisdiction and Functions of Local Courts in Sierra Leone" ibid, 61. As for Nigeria, see S.N.C.Obi, "Courts of First Instance: Their Structure, Composition, Selection and Training Position in Nigeria", ibid, 5.

141 Section 89 of the Criminal Procedure Code.

142 Cap 148 of the Laws of Zambia.

143 See also Section 86 of the Criminal Procedure Code.

144 Government Notice No. 160 of 1961.

145 Statutory Instrument No. 66 of 1964.

146 K.T.Mwansa and A.Mumba, "Zambia Police and the Changing Society" ZANGO, Zambia Journal of Contemporary Issues. (Forthcoming)

147 See schedule to the Act.

148 Section 16 of the Legal Aid Act, 1967.

149 See Report on Police Prosecution in Lusaka, a study sponsored by the Ministry of Home Affairs and conducted by the writer, 1988.

150 Ibid.

151 Professor Allott pointed out in 1963 that "dualism in the legal system is no longer acceptable by all African countries being rejected particularly where it leads to discrimination of an unfair sort or to internal conflict or uncertainties in the law". A.N.Allott, "Codification and Unification of Law in Africa", [1963] J.A.L, 7; 72, 80.

152 Sections 3, 4 and 8 of the Act.

153 The new government took office in November, 1991. Its policy towards the traditional rulers is not yet clearly spelt out. However, indications are that some powers that they enjoyed before 1972 will be restored to them.

154 See section 15 of the Local Courts Act, Cap 54 of the Laws of Zambia. See also R.Purdy op cit, 79.

155 In Papua New Guinea, Fitzpatrick has pointed out that decolonization was widely seen by people as necessitating the revival of traditional or customary system of dispute settlement. See P.Fitzpatrick, "The Political Economy of Dispute Settlement in Papua New Guinea", in C. Sumner (ed), op cit, 241.

156 For instance on 4th. April 1988, a Lusaka magistrate convicted two offenders and ordered that they do Extra Mural Penal Employment (E.M.P.E). But contrary to procedure, he specifically ordered that they dig a specified number of graves at a cemetery. The following day all the newspapers gave this case a prominent coverage and it became a subject of public debate. A High Court judge called for the case record, quashed the sentence and imposed a suspended sentence on two offenders. See The Times of Zambia, April 5th. 6th and 7th, 1988.

TABLE 3 THE USE OF IMPRISONMENT PER OFFENCE CATEGORY, 1947-1953.

<u>Offence</u>	<u>1947</u>	<u>1948</u>	<u>1949</u>	<u>1950</u>	<u>1951</u>	<u>1952</u>	<u>1953</u>
Against person with violence	663	550	580	625	715	819	916
Against person without violence	291	229	242	273	152	748	307
Against property with violence	447	623	149	310	420	418	484
Against property without violence	1,755	1,464	1,917	1,987	8,628	2,273	2,240
Non-payment of Tax	1,024	708	801	445	515	380	470
Employment of Natives	22	265	279	372	130	71	69
In default of fines	862	603	1,013	317	1,550	1,194	1,314
TOTAL	5,064	4,442	4,981	4,329	12,110	5,939	5,800

SOURCE: W.Clifford, Crime in Northern Rhodesia, 1960, 90.

TABLE 4 SENTENCE LENGTH FOR ALL OFFENCES 1947-1953 (Actual Numbers)

Sent. Length.	1947	1948	1949	1950	1951	1952	1953
Up to 1 mo.	1794	1639	1073	1475	820	880	855
1-3 months	2384	2639	2751	2547	2756	2592	3007
3-6 months	916	910	1043	1007	1282	1565	1623
6-12 months	545	551	673	639	737	970	878
12-18 months	165	186	224	171	277	354	384
18 mos & over	247	217	231	212	343	603	455
Total	6051	6142	5995	6051	6215	6994	7166

SOURCE: W.Clifford, Crime in Northern Rhodesia, 1960, 92.

CHAPTER 3

THE ETIOLOGY AND NATURE OF PROPERTY CRIME.

3:1 Incidence of Property Crime.

The official as well as the public view is that all crime is on the increase.¹ But analysis of figures for both reported crime and of the number of offenders taken to court does not show a consistent increase. Table 5 shows no systematic pattern of the overall increase in reported crime in Lusaka between 1978-1990. In 1978, there was a record number of reported offences overall, which, however, declined in 1980, but rose slightly in 1982. Between 1984 and 1988, there was a downward trend in the overall reported crime,² but which rose in 1990.

As for individual offences, the period between 1978 and 1986 saw a decline in the rate of theft by servants and by public servants, but that was followed by an upturn between 1988 and 1990. The same pattern emerges in relation to "other breaking" offences. Table 5 also shows a similar pattern in relation to rape. For other offences no systematic pattern emerges. The year 1984, however, saw a significant drop in the rate for all offences from the previous year. In the case of burglary, for example, the rate dropped from 624.1 per 100,000 population to 172.5 per 100,000 population. Similarly, the rate for stock theft declined from 44.3 per 100,000 population to 2.8 per 100,000 population.

Table 6 shows that there was a general decline in the overall number of persons taken to court for property offences in Lusaka between 1978-1990, except for 1982 and 1984. That general down-

ward trend in the number of persons taken to court was interrupted in 1982 when there was a sudden increase, only to be followed by a decline in the subsequent years. Except for the offences of theft by servants and by public servants, there was a sharp increase in the number of persons taken to court in 1982 for other property offences. The sharp increase in the number of persons taken to court in 1982 in Lusaka is not reflected in national data as Table 8 shows. That could probably be attributed to regional variations in police practices. In addition, Table 5 does show that in 1982 more offences were reported to the police in Lusaka than any other year between 1978-1990.

The Lusaka, pattern both in relation to the number of offences reported and to the number of persons taken to court, generally resembles that for the whole country. As Table 7 shows, the steady decline in the overall number of reported offences nationwide between 1978-1984 was followed by an increase in 1986, but only to be followed by a drop in 1988. As for individual offences, the national trend was more pronounced in the case of other breaking offences while in the case of theft by servants and by public servants, there was a steady decline in reported rate between 1978-1988. As for other offences, no systematic pattern has emerged. But even though there was a sudden increase in the number of reported cases in 1986, that was not reflected in the number of persons taken to court during the same year. On the contrary, there was a continuous decline in the overall number of offenders taken to court between 1980-1988. As will be

seen in chapter 8, the sudden increase in reported crime in 1986 could probably be attributed to the establishment of the vigilante scheme a year earlier in 1985. In the case of Lusaka the impact of the vigilante scheme was felt in the same year it was introduced, i.e, 1985, as chapter 8 shows, because there, the scheme was implemented immediately.

The lack of statistical evidence to support the official and public view that crime is generally on the increase (rather than on the decrease) does not necessarily mean that this view is incorrect. Rather, it may reflect a decline in the rate of reporting because the public has little confidence in the ability of the police to deal with these offences as already seen in chapter 1. Another problem which affects the accuracy of criminal statistics both in Lusaka and in the whole country is the reliability of population figures. The last population census was conducted in 1978 and the figures for subsequent years are based on estimates. It therefore appears that official criminal statistics both nation-wide and in Lusaka do not present the true picture of crime and, as Hatchard has warned they "must be viewed with caution".³

Crime in Zambia, property crime in particular, is an urban phenomenon. Normally, police annual reports do not contain criminal statistics for individual towns, but for some unexplained reason, the 1980 annual report does. It appears that the larger the town in terms of its population, the higher the number of offences reported in that town. Thus Mpika, a rural town with a population of 81,377 people had an all theft rate of

83.6 per 100,000 population in 1980. On the other hand, Lusaka a town with the highest population of 538,469, had the highest all theft rate of 2,034.3 per 100,000 population.⁴

All over the world, crime rates are usually higher in urban areas than in rural areas. Urban areas provide more opportunities such as the availability of a wider range of targets and the greater possibility for offenders to remain anonymous. Unlike the rural areas, social controls are weaker in urban areas.⁵ Another factor that may explain the differences between urban and rural reported crime is the nature of communication facilities that exist in the two areas. Such facilities are much poorer in rural areas and in addition there are fewer police stations.

3:2 The Etiology of Property Crime: Background Characteristics of Offenders.

3:2 (a) Sex

Studies conducted elsewhere have noted a considerable overrepresentation of males in the official criminal statistics. In one Kenyan study, it was found that between 1974 and 1978, 87.6% of imprisoned offenders were males.⁶ An earlier study by Clifford found that only 62 or 1.9% of the 3,127 reported offences (all crimes) in 1963 in Lusaka involved female suspects.⁷

In the present study, of the 538 offenders whose case records were studied between 1982-1989, only 9 or 1.7% were females, the remaining 529 or 98.3% were males. Six of the 9 female offenders were convicted of theft by servants, 2 were convicted of house breaking and one was convicted of burglary. As seen in chapter 1, sex ratio of the population of the most vulnerable group (i.e

those between 8-31 years) in Lusaka is nearly 1:1. It is therefore significant that 50% of the general population contribute 98.3% of the offenders.

One explanation found in the literature for the differences in crime rates between men and women is that the police, who are responsible for the recording of crime, are more tolerant towards women offenders and may ignore crimes committed by women for which men are often arrested. In this study, the police officers interviewed denied that they tolerated or ignored female crime. They were of the view that women were not generally inclined to criminal behaviour especially involving the offences under study. It was pointed out that in nearly all the reports they received, the suspects turned out to be men. It may be mentioned that the small number of female offenders in this study cannot be attributed to the court's "reluctance" to convict female defendants. In the entire sample of 1129 defendants studied, 20 were females, 9 or 45% of whom were convicted. On the other hand, 1,108 defendants were males, 528 or 47.6% of whom were convicted. It would appear that the chances of a female defendant being convicted were nearly as high as those of her male counterpart.

It is difficult to explain the low crime rate among the female population in Lusaka. But a few points can be mentioned which may throw some light on the matter. Firstly, girls and boys undergo different forms of socialization. Traditionally, girls are closely supervised by parents and are expected to be passive, gentle and obedient. On the other hand, boys are expected to be courageous and tough both mentally and physically. They are

expected to be "men" from the earliest stage of life. In addition, boys are expected to begin to provide for themselves earlier in life than girls. Once they are married, men in nearly all cases become the bread-winners and come under pressure to provide for their families. It may be said that the different forms of socialization experienced by boys and girls on the one hand and the different social burdens the two sexes have to bear in adult life on the other may account for sex differences in crime rates.

.....

3:2 (b) Age.

Studies conducted elsewhere indicate that the majority of property offenders are in their early 30s and below. In one Nigerian study, it was discovered that 84% of offenders convicted of robbery were below 31 years old. Similarly, a study in Kenya found that 86.14% of offenders convicted of robbery were aged between 13-35 years and only 13.86% were aged between 36-76 years. In the United Kingdom, a study in Sheffield found that 76.4% of male offenders convicted of property offences were aged below 29 years.

The present study found that case records in relation to four of the 538 convicted defendants did not indicate their age. Of the 534 offenders whose case records indicated their age, 438 or 82.2% were aged between 11-31 years. The age category of 32-43 years accounted for 75 offenders or 14.0% whilst that of 44-55 years accounted for 17 offenders or 3.2% (Table 9). Juvenile offenders (those aged between 8-19 years) accounted for 114 or 21.3% whilst the oldest category of offenders (those aged between

56-67 years) accounted for only 4 or 0.7% of the offenders. The number of offenders convicted of robbery in this study, i.e 6, was too small for a meaningful comparison with both the Nigerian and Kenyan studies. However, this study indicates that many robbery offenders are likely to be aged between 19 and 31 years (Table 9).

As for the 100 interviewed offenders 70% were aged between 18-31 years, 26% were aged between 32-43 years whilst the age groups of 44-55 years and that of 56 years and above accounted for 2% each. Juvenile offenders accounted for 5% of the interviewed offenders. As will be seen in chapters 6 and 7, imprisoned offenders tended to be older than those given non-custodial sentences.

Table 9 also shows that between 1982-1989, the peak age for property crime in Lusaka was 19 years, i.e the largest number of offenders, 49, were aged 19 years. Table 9 further shows that from the age of 46 years upwards, the number of offenders started to decline. Different peak ages have been reported from other countries. In the Kenyan study the peak age for robbery was reported as 25 years, but the number of offenders started to decline at the age of 43 years. On the other hand, a United Kingdom study found 14 years as the peak age for property offences.

As seen in chapter 1 (Table 2), the official population figures for Lusaka show three categories of age groups. The first group consists of those aged between 0-15 years, who number 498,940 or 51.3% of the population, of whom 50.6% are females and 49.4% are

males. The second age group consists of those aged between 16-35 years who number 327,999 or 33.7% of the population, 50.4% of whom are males and 49.6% are females. The last age group is that aged 36 years and over, which consists of 145,232 or 14.9% of the total Lusaka population, 60.2% of whom are males and 39.8% are females. The official population statistics unfortunately do not break the figures down any further.

It is difficult to make a meaningful comparison because the official population figures were calculated on a different basis from the method used in this study. It could, however, be safely assumed that at least 40% of the Lusaka population is between 11-31 years. If that is the case, age is therefore significant in property crime because the estimated 40% of the general population accounted for 82.0% of offenders whose case records were studied and 70% of the offenders who were interviewed.

At the level of individual offence categories, defendants convicted of burglary and house breaking tended to be younger than those in other offence categories. As can be seen in Table 9, both offence categories had the highest number of offenders aged between 11-19 years. In the case of burglary, 33 or 26.8% of the 123 offenders were in that age group. As for house breaking, 36 or 45.6% of the 79 offenders were in the same age group. As already seen above, the overall juvenile population in the entire sample of 538 offenders was 21.9%.

Offenders convicted of house breaking, theft from a motor-vehicle, theft from the person and burglary were over-represented

in the 11-31 years age group. Whilst the over-all population of offenders in that age group was 82.0%, the four offences had 94.9%, 91.1%, 90.7% and 82.9% of offenders in that age group respectively. On the other hand, offenders convicted of theft by servants and by public servants tended to be older than offenders in other offence categories. Thus whilst 17.4% and 31.3% of offenders in the two offence categories respectively, were in the age category of 32-43 years, the number of offenders from other offence categories in that age group was much lower. For instance, only 7.4% of those convicted of theft from the person were aged between 32-43 years. Three of the four offenders in the sample aged 56 years and over were convicted of theft by servants. As seen in chapter 1 and as will be seen in the section on occupation in this chapter, younger men of 25 years and below are more likely to be unemployed than older men in Lusaka.

The results of this study seem to be in line with those obtained in the Nigerian, Kenyan and the Sheffield studies on the question of over-representation of people aged below 31 years among property offenders. This study also tends to show that juveniles tended to commit burglary, house breaking and theft more than any other offences. On the other hand theft by servants and by public servants were mostly committed by older offenders, suggesting as will be seen later in this chapter, a possible link between the younger age group, unemployment and breaking offences.

3:2 (c) Education.

Studies conducted elsewhere have showed lower levels of education among offenders than the general population. A study in Kampala

found that 22.6% of property offenders were "totally uneducated" and only 18.9% of them had completed primary education compared to 43.3% of the general population who had reached that level of education.¹⁶ Kercher's study in Kenya found that 12% of prisoners had no formal education, 27.3% had four years or less of primary education, 43.9% had gone beyond primary school, 8% had gone beyond Form 1V and 4% had been to university or other specialised institution.¹⁷ Similarly, the Nigerian study found that "slightly less than 3/4" of the 340 robbery inmates studied did not go beyond primary school, 20% were drop-outs from secondary schools,¹⁸ less than 10% had completed secondary school or higher education. Further, one British study found that "school failure is an important predictor of offending".¹⁹

In the Zambian educational system, one can leave school at one of three levels. At the lowest level, one can leave after completing 7 years of education, normally at the age of 13. There is an examination for progression to Grade 8. At the intermediate level, one can leave school in Grade 10 (or Form 3) after 10 years of education, normally at the age of 16. There is also an examination here for progression to Grade 11 (or Form 4). The last level at which one may leave school is Grade 12 (or Form 5) after the General Certificate of Education (G.C.E) or Cambridge School Certificate Examination at the age of 18. At this level a school leaver may proceed to college or university or go into employment straight away.

Unfortunately, figures on education in Lusaka are not readily available. It was, however, noted in the Third National

Development Plan that the envisaged goal of providing a Grade One place for every 7 year old child has not been attained nation-wide. It was also noted that the shortage of Grade One places was more accute in Lusaka and other main urban areas in which only 66% of the seven year olds started school. As was seen in chapter 1 only 40% of children from squatter areas in Lusaka get a Grade 1 place.

Available statistics nation-wide indicate that the majority of people leave school at the Grade 7 level. In 1985, for instance, only 21.9% of the candidates who sat for examination for progression to Grade 8 were selected, the rest 78.1% dropped out of the school system. In 1988, the progression rate was 24.4%. The picture is the same when the progression rate from Grade 9 to 10 is examined. In 1988 for example, only 22.3% of those who sat for Grade 9 examination progressed to Grade 10.

Unfortunately, case records do not indicate the educational level of the offender. For this analysis we have to depend entirely on interviews with offenders and prison officers. As Table 10 shows, 52% of all the interviewed offenders had up to Grade 7 level of education, 26% had completed Grade 10, 11% had completed Grade 12 and only 1% had been to university. Nine percent of offenders had never been to school at all.

It would appear that the offenders studied were more educated than the average Zambian population. Official figures show that 40% of eligible children in Lusaka and about 33% of the children nation-wide do not enter the school system due to lack of places

and yet only 9% of the offenders studied had never been to school. This is difficult to explain. But as will be seen in the section on residence in this chapter, 72% of the interviewed offenders were born outside Lusaka, some of whom came to Lusaka to improve their educational standard having had initial education elsewhere in the country. It could be that the ability of most offenders to move up and down the country, looking for opportunities would account for their above average literary level. Prison records on the educational and professional qualifications of prisoners are mostly based on the information supplied by prisoners themselves and on case records (in the case of occupation). The reliability of prisoners's accounts in some cases could also be another factor.

The burglary and other breaking category had the highest number of offenders (76.7%) in the Grade 7 and below educational bracket. The theft category was the next with 46.7% followed by robbery with 40% of offenders in the Grade 7 and below bracket. On the other hand, robbery seemed to have had the most "educated" offenders with 30% of offenders in the Grade 12 bracket. The theft category had the highest number of offenders with no education at all.

It can be seen from Table 10 that on the whole, as many as 62% of the interviewed offenders had only seven years of education or less or they had never been to school at all. But due to the unreliability of official data on education both in Lusaka and nation-wide on the one hand and the unreliability of prison records on the other, it is difficult to reach firm conclusions

on the relationship between the lack of education and the likelihood to offend.

3:2 (d) Occupation.

Some researchers elsewhere have reported a causal link between unemployment and crime, especially property crime. In the Nigerian study, it was found that 38.5% of robbers were²³ unemployed at the time they committed the offences. In the Kenyan study, unemployment was as high as 55% among the robbers²⁴ studied. In the present study, as already indicated, only 6 of the 538 offenders were convicted of robbery and makes it difficult to compare with both the Nigerian and the Kenyan studies. On the other hand, the Kampala study found that only 13% of the imprisoned offenders were unemployed at the time they²⁵ committed offences. The Kampala study also found that 49.9% of suspects claimed that they were unemployed at the time of the offence. The researchers explained that discrepancy by saying that some suspects did not disclose their occupation for fear of losing their jobs once their employers heard of their arrest. The other explanation offered was that there might have been a recording problem whereby the police recorded those suspects who gave "street-selling" or "self-employment" as their occupation as unemployed. Thus the researchers in the Kampala study concluded that: "Unemployment may be a basis for justifying theft, but it cannot be considered a 'cause' behind the decision²⁶ to commit crime". They further added that if unemployment was a general problem, the unemployed felt less frustrated than if most people had jobs. That, according to the researchers accounted

for the lack of a relationship between unemployment and crime in Kampala. They put it this way:

"Moreover, unemployment in a developing country does not necessarily mean that a person is suffering real financial hardship and conversely, being self-employed, for example, as a street-vendor does not mean that such a person is better off than the unemployed".²⁷.

On the other hand a major British study concluded that:

"Proportionally more crimes were committed by youths (18 years and older) during periods of unemployment than during periods of employment...suggesting that unemployment was related to crime independently of the many variables and individual differences between offenders and unconvicted persons."²⁸.

Further, they stated: "This research is highly suggestive but²⁹ it does not prove unambiguously that unemployment causes crime".

In the present study, 206 of the 538 offenders whose case records were studied were convicted of theft by servants and by public servants as Table 11 shows. Of the remaining 322 offenders, 153 or 46.1% were unemployed at the time of the offence.(Table 11). As for individual offences, theft from the person had the highest proportion of offenders who were unemployed i.e 27 or 50%. That was closely followed by burglary and house breaking with 61 or 49.6% and 39 or 49.4% of the offenders recorded as unemployed respectively. On the other hand, stock theft and robbery had the lowest proportion of offenders who were unemployed, i.e 2 or 22.2% of the 9 offenders and 2 or 33% of the 6 offenders respectively.

The same pattern emerged when occupation among the interviewed offenders was examined. It was found that on the whole, 41.8% of the interviewed offenders were unemployed at the time they

committed the offences. Burglary and house breaking had the highest proportion of offenders who were unemployed, amounting to 53.3%.

Unfortunately, employment figures for Lusaka are not readily available, but as already seen in chapter 1, young men of 25 years and below are more likely to be unemployed than persons above that age in Lusaka. In this study, it was found that 131 or 85.6% of the 153 offenders who were unemployed at the time of the offence, were aged between 11-25 years. On the other hand, only 47.6% of the offenders who were employed at the time of the offence were aged between 11-25 years. This suggests a close, though inconclusive relationship between unemployment, an apparent age of between 11-25 years on the one hand and the likelihood of committing property crime on the other.

Available results from research conducted elsewhere suggest that the majority of property offenders who were employed at the time the offences were committed were petty traders and unskilled workers. In the Kampala study for instance, 79.7% of the offenders who were employed at the time of the offence were engaged in the above-mentioned employment category.

The present study shows that, excluding offenders who were convicted of theft by servants and by public servants, 53.9% of the interviewed offenders and 58.2% of the offenders whose case records were studied were employed at the time of the offence. Of the 332 offenders whose case records were studied and who were employed at the time of offence, 62.3% were unskilled workers,

house servants or were self-employed petty and market traders. Businessmen, clerical, managerial and skilled workers constituted 29.3% and 6.3% were students. In the case of 2.1% of the offenders, their case records did not indicate their occupation as Table 11 shows. As for the interviewed offenders, 79% of those who were employed at the time of offence, were unskilled workers and petty traders, whilst 21% were in skilled, managerial and professional categories.

In the case of offenders convicted of theft by servants and by public servants, evidence from both the case records and interviews of offenders showed that 72.8% of them were employed as house servants, general workers on farms and construction sites, clerical and sales workers. The rest were professional, skilled and semi-skilled workers. It would appear that offenders who were employed at the time of the offence, (including those convicted of theft by servants and by public servants) were mostly engaged in jobs with the lowest income, though they might have been better off than those who were unemployed at the time of the offence.

Interviews of offenders revealed that 68% of those who were unemployed at the time of offence had lost their jobs within the previous one year and were actively looking for work. On the other hand, the remaining 32% said that they had never held a job prior to the offence. When asked if the lack of employment was the reason for the offence, 87% said "yes" and added that they would not have committed the offence had they been employed. The rest (13%) said that unemployment was not the reason and they

would still have committed the offence had they been employed. Unemployment seems to be significantly but not conclusively related to property crime, considering that 206 or 38% of the 538 offenders whose case records were studied were convicted of theft by servants and by public servants.

3:2 (e) Residence.

On the whole, it can be seen from Table 12 that a total of 409 or 76.0% of the 538 offenders whose case records were studied lived either in site and service areas or in squatter or up-graded squatter areas of Lusaka. In chapter 1, (Fig I) we saw that 62% of the Lusaka population is concentrated in the site and service areas or in squatter and up-graded squatter areas. These areas consist of 26% of the total Lusaka landmass. It is significant that 76% of the offenders lived in the areas which contains 62% of the Lusaka population. On the other hand, 69% of the interviewed offenders lived in site and service areas and in squatter and up-graded squatter areas at the time of the offence.

The heavy concentration of offenders in those deprived areas does not necessarily create a conclusive relationship between living in squatter and up-graded squatter areas and the likelihood of offending. There are many law-abiding residents in those areas. Rather it suggests that living in those areas increases the likelihood of being arrested, prosecuted and convicted.

When occupation and residence of offenders are examined together, interesting relationships emerge. For instance, as Table 13 shows, there seems to be a relationship between living in a

squatter and up-graded squatter areas and being unemployed. As can be seen from that Table, a total of 123 or 30% of the offenders who lived in those areas were unemployed at the time of the offence. It also emerged that 11 out of the 14 or 78.0% of the offenders who had no fixed abode at the time of the offence were also unemployed. This may suggest, though not conclusively, a link between being unemployed and living in a site and service area or in the squatter and up-graded squatter area on the one hand and the likelihood of being arrested for property crime on the other. It may also suggest a possible link between being of no fixed abode and unemployed on the one hand and the likelihood of being arrested for property crime on the other. But as already mentioned above, this link or the popular view is not conclusive. For instance, Table 13 also shows that 5 or 45.4% of the 11 offenders who lived in medium and low cost areas were unemployed at the time of the offence.

It may be necessary to mention that of the 100 interviewed offenders, only 28 were born in Lusaka. The rest were born outside Lusaka, the majority of whom (51 of the 72 or 70.8%) said that they came to Lusaka as teenagers to look for employment. A significant number of these 51 offenders said that an extended family member, eg, brother, uncle or brother-in-law, sent for them from wherever they were (village or some other place), promising them a job in Lusaka. Eleven of the 72 offenders or 15.3% said that they came to Lusaka because their employer transferred them to Lusaka or their parents or guardians were transferred to Lusaka. Lastly, ten or 13.8% of the 72 offenders

said that they came to Lusaka to look for education after being sent for by an extended family member.

3:3 The Offending Patterns

3:3 (a) The Nature of Property Stolen.

The nature of property stolen may have implications on the decision to allocate police resources to the case and on the decision to prosecute (see chapter 4). Further, the nature of the property stolen or the quantity may aggravate an otherwise minor offence, thereby attracting a heavy sentence as will be seen in chapter 6. It may be useful therefore to mention briefly the type of property most frequently stolen.

Case records and interviews of offenders revealed that electronic house-hold goods, such as TV sets, video recorders, radio cassettes, cash, clothes and bedding were the most likely targets in burglary, house breaking and residential robbery. In the case of theft, motor-vehicle parts and accessories, such as wheels, tyres, head lamps, car radios and cassettes were particularly vulnerable. In addition, cash either on its own or in handbags, or wallets and building materials such as roofing sheets were also frequently stolen. Food stuffs, such as fruits, vegetables and drinks were the main items stolen especially by servants.

3:3 (b) Group and Lone Offending

In the Kampala study, it was found that only 13.8% of those³¹ arrested for property offences committed the offences in groups. But the Kenyan study already mentioned found that between 1972-1973, robbers in 90% of the cases acted in groups of between 2-

30. The Sheffield study found that breaking offences for both juvenile and adult offenders were more often committed in groups than any other kind of offence.

In this study, case records revealed that only 138 or 25.7% of the 538 offenders were convicted jointly (with between 1 and 5 joint offenders). As for individual offences, those convicted of stock theft and burglary had the highest number of offenders who were jointly convicted. Table 14 shows that 3 or 33% of the 9 offenders convicted of stock theft, 36 or 29.3% of the 123 offenders convicted of burglary had accomplices. On the other hand, interviews of offenders revealed that 58% of all offenders committed their offences in groups of between 2-5 people. As for individual offences, it was found that 83% of those convicted of burglary, and house breaking and 90% of those convicted of robbery committed their offences in groups.

The wide discrepancy between offenders whose case records were studied and those who were interviewed with regard to gang offending is due to the nature of the two offender samples. Case records do not disclose the full circumstances of the offence. Further, case records do not show whether or not all the members of the gang were arrested let alone convicted. It would therefore seem that in this regard evidence from interviews of offenders as supplemented interviews of police officers presented a more accurate picture of the extent of group offending in property crime in Lusaka. Thus all the police officers interviewed at the four police stations visited agreed that nearly all breaking

offences were committed in groups. At Kabwata police station for instance, the Chief Inspector informed the writer that he "knew" the gangs in the area and he could tell which group broke into particular a premises by the nature of the breaking. But although³⁴ this information is available to police officers, the clear-up rate for burglary, house breaking and robbery remains among the lowest in Lusaka as Table 39 shows. It is the capacity to investigate and assemble evidence against the "known" gangs which seems to be the main problem.

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The fact that gang offending is associated with some but not all property offences suggests that particular types of crime by their nature require more or fewer people to carry them out. For instance, in the case of burglary at least three people are needed to carry it out: one person remains outside the premises to look out for any signs of danger while two others proceed inside to remove the goods. Similarly, more than one person is needed to steal cattle as the animals are usually herded miles away to the markets, usually at night. On the other hand, stealing an employer's property such as food from the farm or factory or cash from a till can easily be effected by one individual.

But gangs can be a liability as they may increase the chances of arrest. As will be seen in chapter 4, a "mistake" by a gang member after a "successful" crime may lead to the arrest of the entire gang. In addition a dispute over the distribution of stolen items may force the aggrieved party to talk, thus leading to the arrest of the gang.

3:3 (c) Planned and Unplanned Offending.

It is important to examine the element of planning and organization in the offences studied because it may be an aggravating factor justifying a heavier sentence. Case records in magistrate's courts do not carry information on whether the offender planned his offence or not. Interviews of offenders revealed that 60% of offenders had planned their offences. There were variations at the level of individual offences. Under the theft category, only 30% of offenders planned their offences, as compared with 73.3% and 80% of offenders who planned their offences under burglary and house breaking and robbery categories respectively. It would appear that the planning of offences was related to the seriousness of the offence in question.

Planning of the offence was an elaborate process. It included a selection of a particular house or premises to break into, after a period spent surveying the area. It also included detailed information about the exact location of the property wanted in the premises, whether the premises were guarded or not, and the movements of occupants (i.e the precise times when they were away and when they were there). Most of that information was supplied by neighbours, especially children, domestic servants and watchmen. Only in rare circumstances did offenders keep stolen property in their homes, especially if it was intended for sale. Arrangements were made for the temporary storage of property at the home of a third party, i.e someone who did not take part in the offence. In other cases, property was stolen only after getting an "order" from a "customer". In those

circumstances, property was delivered immediately after it was stolen. That was the most common practice in relation to theft of a motor-vehicle and theft of expensive items such as T.V sets and building materials.

One factor found to be associated with planned offending was the distance offenders had to travel in order to commit offences. Studies conducted elsewhere have showed that in many cases, offenders choose their targets away from home.³⁶ Interviews of both the offenders and police officers revealed that on the whole, 70% of offenders, the majority of whom had planned their offences (other than those convicted of theft by servants and by public servants) committed offences outside their neighbourhood. When individual offences were examined, it was found that 90% of offenders convicted of robbery and 76.7% of those convicted of house breaking travelled considerable distances to their targets. Their targets were usually wealthy suburbs or the city centre as will be shown later in this chapter. It may be said that the more serious the offence the more likely the offender tended to choose far-away targets. In other words the more serious the offence the larger the distance between the place of residence of the offender and the place of offence. There were many reasons which were advanced by the offenders for committing offences away from their neighbourhood. Most of them claimed that their neighbourhood lacked the property that they themselves or their "customer" wanted. Others said that the risk of being caught was higher if they offended in their neighbourhood. A few offenders stated that they needed to cultivate contacts and build

good relations within their communities and as a result they felt³⁷ compelled to direct their criminal activities elsewhere. Most offenders travelled an average of 10km to their targets.

Unplanned offending involved a group or individual reaction to a sudden opportunity to steal. The victim was generally unknown before hand and the problem of disposal of stolen property usually arose. Consequently, most offenders who had not planned their offences risked being arrested with stolen items either on their person or in their homes. Most offences which were not planned were committed by individuals acting alone.

3:3 (d) Motivation for Crime and Attack Methods.

Even though interviews of offenders revealed that each category of offenders had their own motivation for committing offences, most offenders simply pleaded "poverty". The offence was seen as a way to alleviate their suffering. Thus nearly all property stolen (with the exception of cash and in some cases food items) was not kept for use by the offender, but was sold and the cash used to buy essential items or drink. For most offenders therefore, property crime was seen as part of an economic struggle to survive. In one study in Cali, Columbia, it was found that property crime was seen by many offenders as inter-alia³⁸ providing an escape from low status.

Many offenders perceived a low risk of arrest or detection and few expected to be arrested in the course of committing an offence. Many offenders did not attribute their arrest to the diligence of police detectives. Rather they attributed it to "bad

luck", "mistake" or indiscretion on the part of either the accomplice or the buyer of the stolen property. As will be seen in chapter 4, a large group of offenders were arrested as a result of information provided by either the accomplice or the buyer of stolen property.

Most thefts are either from the person or from a motor-vehicle. Theft from the person is committed especially during the peak hours of between 7.00 and 8.30 in the morning and between 4.30 and 6.30 in the evening. The majority of offenders find their targets along Cairo Road (the main shopping street in the city center), particularly at the super markets or at the crowded city bus station or at the city center market.

The majority of thefts from a motor-vehicle occur on Saturday mornings when many people are out shopping in the city center. These thefts, however, do sometimes occur outside the city center and not necessarily during the week-end. Thus some parts are stolen from vehicles parked outside homes, usually at night.

Most motor-vehicles are stolen during normal working hours, especially from the city center or from crowded areas such as football stadiums. On the other hand, most stock thefts are committed between 6 PM and 6 AM. These are the hours most convenient for driving animals away from kraals. The targets in the majority of cases are villages some 20-30 km away from Lusaka.

The most favourable hours for burglary and residential robbery are between 1-4 AM, and these offences reach their peak during the rainy season, although some breaking offences especially

those whose targets are small shops in enclosed markets occur at night. Entry into homes is usually secured through the kitchen door or through the kitchen window, despite the fact that windows in most homes in Lusaka are burglar-barred. Doors are in most cases kicked in and in the case of windows, offenders squeeze themselves in between burglar-bars which are not so close to each other, after breaking the window. In other cases, burglar bars (especially the flat ones as opposed to the round ones) are simply removed in order for the offender to secure entry into the house.

3:4 Recidivism

The rate of recidivism is an important measure of the success (or failure) of crime prevention strategy as will be seen in chapter 8. In the case of sentencing, recidivism, may not aggravate the offence, but may deny leniency to the offender as will be seen in chapters 6 and 7. For these reasons it may be necessary to examine the extent of recidivism in the two samples of offenders in this study.

In the case of 96 or 17.8% of the 538 offenders, the case records did not state whether or not they were first offenders. In the case of 441 or 82% of the 538 offenders, the case records showed that they were first offenders. It was only in the case of one offender or 0.2% of this sample that the case record specifically stated that he had a previous conviction. This case is discussed in detail in chapter 6.

This cannot be the true picture of recidivism among property

offenders in Lusaka. Table 15 shows that, every year on average, 42% of all prisoners nation-wide are recidivists. Another study found that 85% of recidivists studied in urban prisons including
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Lusaka were property offenders. The extremely low figure of recidivism among the 538 offenders in this study signifies poor record keeping and the unsatisfactory procedure for ascertaining previous convictions. Proof of previous convictions at the time of sentencing is not presented in accordance with the laid down procedure as will be seen later in this thesis (chapter 6).

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In some cases, as happened in the one case already referred to above, the magistrate himself may identify a particular offender as having been convicted by him in the past and accordingly treat him as a recidivist. Yet in other cases, the court relies on the
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convicted person to state whether or not he is a first offender. Some recidivists take advantage of this situation and present themselves as first offenders in the hope that they will get a
41
more lenient sentence.

Interviews of offenders, supplemented by prison records revealed that 55% of offenders in all offence categories were first offenders. Ten percent had been summoned to the Police Station, questioned about a certain offence and later released without being charged with any offence, 3% had their previous cases withdrawn in court before judgment was delivered and 32% were recidivists (Table 16). Of the 32 recidivists, 28 had one previous conviction each, two had three previous convictions each and the other two had three and four previous convictions each, respectively.

It would appear that interviews of offenders as supplemented by prison records, presented a more realistic estimate of the rate of recidivism than the case records. But when the number of offenders with a police record only and the number of offenders whose cases were withdrawn in court is added to the figure of first offenders, the latter reaches 68%, far above the national average of first offenders which stands at 58%. On the other hand, the rate of recidivism found in this study, i.e., 32%, is far below the result of an earlier study which found that 84% of the recidivists in the urban prisons were convicted of property offences. These discrepancies may be due to the nature of the sample and the location of this study. The other reason could be the recording practices of various prisons throughout the country. Due to poor record keeping, information on recidivism is sometimes sought from offenders themselves by prison authorities, as is the case with the courts. Whatever the case may be, the real rate of recidivism in both Lusaka and the whole country cannot be ascertained with any degree of accuracy.

There were three offenders whose previous cases had been withdrawn in court before judgment was delivered. One of the cases was withdrawn at the instance of the police because the owner of property involved had left the country after it was recovered and given back to him. The other two cases were withdrawn at the instance of complainants or victims and the matter was settled out of court between themselves and the offenders. As will be seen in chapter 5, offences involving 457 or 40.5% of the 1129 defendants whose case records were studied

were withdrawn in this manner.

3:5 Criminal Careers.

The concept of criminal careers emerged in the United States in the 1960s. It emerged as an attempt to find an alternative explanation of crime to counter-act the psychological explanation dominant in the 1950s. At the core of the concept is the assertion that criminal behaviour should be seen as a "socially determined role playing which produces a career⁴² pattern". The offender is usually part of a gang, perceives himself as a criminal and displays a negative attitude towards the law. He persists in crime, first as a juvenile and graduates into an adult criminal.

This study did not find strong evidence of the existence of criminal careers among the 100 interviewed offenders. Three offenders, however, stood out as exceptional in the way they persisted in crime.

The first one was convicted of burglary and told the writer that he had committed 19 burglaries and thefts before but had been caught, prosecuted and convicted on 3 occasions only. His offending span covered a period of 19 years (1970-1989). During⁴³ that period he graduated from theft to breaking offences.

The second offender was convicted of theft of a motor-vehicle and told the writer that he started stealing cars in 1973 as a juvenile and persisted in stealing up to 1989- a period of 16 years. At the time of the interview, he had served three previous prison sentences and one suspended sentence, all for theft of a

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motor-vehicle.

The third and last case involved a young man who was convicted of store breaking. His offending span covered a period of seven years, from 1982 to 1989. He began committing offences whilst at school, stealing fellow pupil's property such as lunches and money. After leaving school, he turned to shop lifting later specialising in store breaking in the market and usually in a group of two or three accomplices. He confessed that his gang committed three to four breakings in a week using a master key which he had made from an ordinary key. His accomplice was later caught with the key which was confiscated by the police.⁴⁵ Throughout that period (i.e, before he was arrested for the present offence), he had been arrested and prosecuted only once and that was for store breaking. Since he was a juvenile he was discharged.

3:6 Conclusion.

As will be shown later in this thesis (chapter 5), a sizeable number of offences is not reported because the victims have no confidence in the ability of the police to apprehend the suspect. The distance between the victim and the nearest Police Station, the poor communication system as well as the desire to settle certain offences outside the jurisdiction of the courts equally affect the rate of reporting. The problem of reporting of offences, coupled with the absence of self-report studies makes it difficult to estimate the extent of crime both in Lusaka and in Zambia. There is also the problem of the reliability of

official statistics. Unfortunately in Zambia, the police are the only official organ charged with the responsibility to record and publish figures on reported crime. Both the courts and the prisons have to rely on figures initially recorded by the police. This study therefore does not pretend that the discussion on the incidence of property crime, recidivism and criminal careers presents an exhaustive or an entirely accurate account.

An attempt to present a sketch of the background characteristics of offenders has been made. It shows that the majority of property offenders in Lusaka have a deprived background. In general terms, a typical property offender is likely to be: a male, aged between 11-31 years, living in a squatter or up-graded squatter area, a school drop-out and unemployed. If he was employed at the time of the offence, he is most likely to have belonged to the lowest income bracket. It seems therefore that most property offenders are trapped in a vicious circle of poverty in which property crime is seen as part of an economic struggle to survive and to escape their poverty. This finding is in line with the conventional wisdom as well as research evidence elsewhere which tends to show that most crimes are committed by people of lower social and economic status. For instance, it has been observed in Nigeria and it is equally true of Lusaka that:

"...property offences occur disproportionately among members of the unskilled, the marginally employed and the unemployable stratum".⁴⁶.

But this finding should be interpreted in the light of police discretion. The fact that the police are the principal decision

makers on the question of who should be arrested and prosecuted makes them the main source of bias in the production of official criminal statistics. Thus it may be said that the association between criminal behaviour and status may be the result of police practices before and after arrest. Such practices (or discretion) often leads to the arrest, prosecution and conviction of a sample of people already biased in terms of background characteristics, thus making the whole scenario look like a self-fulfilling prophecy. Box and Ford's observation about England probably holds true for Zambia as well. They state that:

"Their (the police) routine procedure is to question mainly those citizens who dwell in 'typical criminal neighbourhoods' and to suspect those who, through speech, manner and character impressions given off, happen to resemble 'typical criminals'".⁴⁸. (writer's brackets)

Recently, Professor Reiner has pointed out that one view prevalent among some writers in Britain is that:

"...the differential exercise of police powers against the socially disadvantaged and relatively powerless is the product of bias, stereotyping and amplification of the apparent deviance of these groups".⁴⁹.

Further, it is common knowledge that most property crimes reported to the police are those committed by individuals who fit the conventional description of a criminal as found in this study. This is because these crimes are more "visible" than other crimes such as forgery and fraud. In addition, the perpetrators of the crimes under study have fewer means or none at all to avoid detection and prosecution. Chapter 4 addresses the problem of police-suspect encounter and argues that the lack of police accountability, coupled with poor police-public relations is one

of the reasons for police brutality towards suspects. At this stage, it may be said that the lack of police accountability as well as poor police-public relations both in Lusaka and in the whole country are the probable reasons for the overrepresentation of the poor, the unemployed and the squatter residents in the official criminal records.

It seems therefore that in order to establish conclusively an association between lower social economic status and property crime, there is need to supplement the results of this study with a self-report survey. That survey should be conducted among both the lower and high social economic status groups. But as already indicated in chapter 1, a past attempt at a self-report survey among adults in Zambia was a failure due to lack of cooperation from the public. On the other hand, it may be said that this study, as far as official records are concerned, has established a relationship between property criminality and lower social and economic status in Lusaka.

It has been seen above that the possibility of police bias in law enforcement (whose solution partly lies in an effective system of police accountability as will be seen in chapter 9) is one explanation for the predominance of poor people in official criminal statistics. There is, however, an alternative explanation which can go a long way towards crime prevention.

In his study of crime among school leavers in Kenya, Evans explained the problem in the context of Merton's theory of anomie. The anomic theory of crime is an attempt to explain

crime in the American society. It states that the American society has a set of culturally defined individual goals or success on the one hand and a set of regulations or laws providing the conventional way to achieve those goals on the other. But this conventional way to the riches or to the "American dream" is not always readily available to every one. For those whose conventional means are not available or are "blocked", the result is a cultural chaos or anomie or normlessness which gives rise to a mental conflict as the moral obligation to adopt conventional means is weakened further by blocked opportunity.⁵¹

Applying this theory to his Kenyan study, Evans observed:

"Ever since the colonial era when education came to constitute the primary avenue of African access into the European controlled economic sector, where new standards of wealth, status and power were to be achieved, education has been viewed by African parents and children as a guaranteed ticket to wage employment in the modern sector.... especially in Government service".⁵²

His findings are, in a sense, applicable to the present study as he concludes:

"Given the limited nature of legitimate employment and income opportunities in the Kenyan's economy, another form of innovation that seems likely to characterise the adaptation of many school leavers involves the utilization of illegitimate means to attempt to achieve the goals no longer attainable through the traditional and/or available means of mobility."⁵³

But while it may be plausible to argue that poverty among property offenders limits their choice of legitimate pursuits and therefore makes them turn to crime, it is also true that poverty is equally prevalent among the law abiding people in Lusaka as seen in chapter 1. In other words, poverty alone or low social

and economic status cannot be sufficient reason for committing property crime. It would appear therefore that being poor or having low social and economic status only makes it more likely for one to commit property crime.

But background characteristics of offenders have implications on crime prevention policy and practice. At present, crime prevention centers mainly on the activities of the criminal justice sector, i.e the legislature (in form of increased severity of penalties), the police and the courts. Given the background characteristics of offenders as presented in this chapter, this narrow approach to crime prevention can no longer be justified. There is need to incorporate a social policy in the crime prevention strategy which should tackle particular issues of poverty and unemployment. The way this may be achieved is suggested in chapter 8.

Further, the nature of offending should provide useful information for counter measures designed to prevent crime. In particular, the attack methods of each crime, the hours within which each offence is mostly likely to be committed and the channels of disposal of stolen property must be carefully assessed and be incorporated in the crime prevention strategy. The way in which this may be done is also suggested in chapter 8.

Notes.

1 See for instance, I.Clegg, P.Harding and J.Whetton, op cit "Summary of Policy Proposals", 11-12. At the 4th National Convention of the thenruling party held in September, 1989 one of the resolutions passed read in part: "The Convention noted with disappointment the increase in the rate of crime, notwithstanding the several measures taken to contain the situation and urged the speedy establishment of vigilante groups in all sections of the Party throughout the Republic..." Monitoring Report of the Defence and Security on the Implementation and Administration of the Vigilante Scheme in Southern, Copperbelt, Luapula and Lusaka Provinces, Party Control Commission of the United National Independence Party (U.N.I.P.), Lusaka, August, 1990, 9.

2 These figures look odd. When the police officer responsible for the recording and production of statistics (Inspector Kunda) was queried, he insisted that the figures were correct and they were in accordance with the crime reported during that period. Given the operational problems affecting every aspect of police functions, as will be seen later in this thesis, these figures probably are reflective of those problems rather than the general decline in crime.

3 See also J.Hatchard, op cit, 1984, 167; J.Hatchard, op cit, 1985, 483-484. See also M.B.Clinard and D.A.Abbott, op cit, 22-28.

4 See Zambia Police Annual Report, 1980, 27.

5 Clegg et al, op cit, Annex A, 3.

6 L.C.Kercher, The Kenya Penal System, Past, Present and Prospects, Washington D.C, 1981, 143. In another study, Muga found that only 0.7% of the robbery offenders females. See E.Muga, Robbery With Violence, Nairobi, 1980, 77.

7 W.Clifford, "Female Crime in Lusaka", paper presented to the First Central African Scientific and Medical Congress, Lusaka, 26-30 August, 1963.

8 See W.Clifford, op cit, 1974, 40, quoting M.Grunhurt, Penal Reform, London, 1948, 411-412. See also E.Muga, ibid, 1980, 78.

9 M.S.Tembo, "Women's Liberation in Zambia: The Status and Potential for Sexual Equality", in K.Osei-Hwedie and M.Ndulo (eds) op cit, 1985, 254. See also E.Muga, ibid, 80.

10 S.Ekpenyong, "Social Inequalities, Collusion and Armed Robbery in Nigeria", 19 Brit.Jo.Crim. (1979), 29. A study in Cali, Columbia, found that the "overwhelming majority of offenders studied were aged between 15-30, see C.Birkbeck, "Property Crime and the Poor in Cali, Columbia, in C.Sumner (ed), op cit, 167.

- 11 E.Muga, op cit, 1980, 96.
- 12 J.Baldwin and A.E Bottoms, op cit, 67.
- 13 E.Muga, op cit, 1980, 82. As for the Kampala study, see M.B.Cilnard and D.A.Abbott, op cit, 95.
- 14 J.J.McKissack, "The Peak Age for Property Crimes" 7 Brit.Jo.Crim. (1967), 186.
- 15 But it has been pointed out elsewhere that the view that most offenders are young people (an "official" view), overlooks the possibility that adult offenders may be better able to avoid detection. Besides, even though adult crime may be less numerous, it may be more serious in terms of property damage and victim's numbers. See S.Box and F.Ford, "The Facts Don't Fit: On the Relationship Between Social Class and Criminal Behaviour" Sociological Review, 19 (1971), 38.
- 16 M.B.Clinard and D.A.Abbott, op cit, 181.
- 17 L.C.Kercher, op cit, 218
A study by Muga found that out of the 909 robbers who were imprisoned in 1973, 343 or 38.28% were illiterate, 423 or 46.53% had only some primary education (i.e 7 years of education). In other words, 771 or 84.81% of the 909 offenders had only 7 years of education or none at all, op cit, 1980, 38.
- 18 S.Ekpenyong, op cit, 28.
- 19 D.P Farrington, "Early Precursors of Frequent Offending" in G.D.Loung and J.Q.Wilson (eds), From Children to Citizens: Families, Schools and Delinquency Prevention, New York, 1986. See also, J.C.Philips and D.H.Kelly, "School Failure and Delinquency: which Comes First?", Criminology, 17, 194. (1979)
- 20 New Economic Recovery Programme, 4th National Development Plan, 1989-1993, Vol I, National Commission For Development Planning, Lusaka, 1989, 299.
- 21 M.Mwanalushi, "Youth Unemployment: Problems and Prospects" in Growing Up in Africa Today, Mental Health and Social Change, Report of the Africa Regional Workshop on Mental Health and Youth, Lusaka, Zambia, 15-19th June, 1987, Commonwealth Secretariate, London, 52.
- 22 New Economic Recovery Programme, op cit, 300.
- 23 S.Ekpenyong, op cit, 29.
- 24 E.Muga, op cit, 1980, 57.
- 25 M.B.Clinard and D.A.Abbott, op cit, 180.
- 26 Ibid, 180.

27 Ibid, 181.

28 D.P.Farrington et al, "Unemployment, School Leaving and Crime", 26 Brit.Jo.Crim., 351. (1986).

29 Ibid, 352.

30 It is rather suprising that the chapter on Lusaka in the New Economic Recovery Programme, op cit, has no data on employment in Lusaka. One study pointed out that, nation-wide, between 1980-1984, only 12% of the economically active population was employed in the formal sector, 11% was employed in the informal sector and 77% was unemployed. It was also reported that during the same period some 55% of the unemployed people were aged between 15-24 years, see M.Mwanalushi, op cit, 52.

31 M.B.Clinard and D.A.Abbott, op cit, 203.

32 E.Muga, op cit, 1980, 57.

33 J.Baldwin and A.E.Bottoms, op cit, 71-72.

34 Intreview with Chief Inspector G.J.E.Kapembwa, at Kabwata Police Station, 15th November, 1989.

35 See D.A.Thomas, Principles of Sentencing, London, 1980, 140.

36 See J.Baldwin and A.E.Bottoms, op cit, 57 and C.Birkbeck, op cit, 182.

37 For instance, Mulenga, (Burglary), interviewed on 25th August 1989, G.Shawa, (Theft) interviewed on 17th August 1989 and E.Chishimba, (Burglary) interviewed on 13th September, 1989. Birkbeck found a similar reason advanced by some offenders he studied in Cali, Columbia, ibid, 183.

38 C.Birkbeck, ibid, 168.

39 K.M.M.Likando, "Rehabilitation Programmes and Recidivism in the Zambian Prison System", M.A. Dissertation, University of Zambia, 1983, 105.

40 This practice was observed by the writer in an earlier research conducted on behalf of the Ministry of Home Affairs, Lusaka. See Report on Police Prosecution in Lusaka, 1988. (Unpublished).

41 For instance, R. Nyirenda, (House Breaking), interviewed on 6th October, 1989. This prisoner informed the writer that after his first conviction, he told the court at each of the three subsequent convictions that he was a first offender. The police could not challenge him because they had no record of his previous convictions. The only reliable records on recidivism are those compiled by the Prisons Department as we will see in chapter 8.

- 42 D.Walsh and A.Poole, A Dictionary of Criminology, London, 1983, 29. See also D.G.Gibbons, Changing the Law-Breaker, Englewood Cliffs, 1965.
- 43 R.Nyirenda, (Foot note 41).
- 44 P.Mbao, interviewed on 1st September, 1989.
- 45 M.Lumbwa, interviewed on 12th September, 1989. The master key was confiscated at Chelston Police Station where this offender was arrested. Detective Chief Inspector Sampa told the writer in an interview that the master key in question was tried and it opened all the doors in the police station.
- 46 S.Ekpenyong, op cit, 30, quoting O.Oloko, (nd) Whither Nigeria: Twenty Basic Questions Yet Unresolved, Lagos, 1986, 20-21.
- 47 See also R.Finnegan, "Do the Police Make Decisions" in J.Baldwin and A.Keith Bottomley, Criminal Justice, Selected Readings, London, 1978, 68.
- 48 S.Box and F.Ford, op cit, 36.
- 49 R.Reiner, The Politics of the Police, London, 1984, 124. Professor Reiner further says that in Britain "Being young, male, black, unemployed and economically disadvantaged are all associated with a higher probability of being stopped, searched, arrested, charged...", *ibid*, 128.
- 50 Most self-report surveys conducted elsewhere have used juveniles as subjects and not adults. See for instance, L.McDonald, Social Class and Delinquency, London, 1969 and W.B.Bytheway and D.R.May, "On Fitting the 'Facts' of Social Class and Criminal Behaviour: A Rejoinder to Box and Ford" Sociological Review, 19 (1971), 585.
- 51 See R.K.Merton, "Anomie, Anomia and Social Interraction: Contexts of Deviant Behaviour" in M.B.Clinard (ed) Anomie and Deviant Behaviour, New York, 1964, 213-242.
- 52 E.B.Evans(Jr), "Secondary Education, Unemployment and Crime in Kenya", The Journal of Modern African Studies, 12; 1, 1975, 71. See also W.Clifford, op cit, 1974, 171 and S.Ekpenyong, op cit, 31.
- 53 Ibid, 56-57.

TABLE 5:

NUMBER OF CASES REPORTED TO THE POLICE IN LUSAKA
1978-1990 PER 100,000 POPULATION

	1978		1980		1982		1984		1986		1988		1990	
	No.	Rate	No.	Rate	No.	Rate	No.	Rate	No.	Rate	No.	Rate	No.	Rate
MURDER	85	17.3	104	20.4	132	22.7	29	4.5	32	4.3	126	15.0	158	16.3
ASSAULT	3984	813.1	4910	926.4	6121	1055.3	2017	310.3	2761	373.1	4808	572.3	3659	377.2
RAPE	78	15.9	72	13.6	70	12.1	15	2.3	12	1.6	70	8.3	84	8.6
BURGLARY	3670	749.0	4012	756.9	3620	624.1	1121	172.5	1219	164.7	2819	335.6	3286	338.8
HOUSE BREAKING	1665	340.0	1530	288.7	1633	281.5	433	66.6	762	103.0	1458	173.6	1860	191.7
OTHER BREAKING	1591	324.7	1380	260.4	1430	246.5	461	70.9	511	69.0	1327	158.0	960	99.0
THEFT OF A MOTOR VEHICLE	1128	230.2	665	125.5	858	147.9	541	83.2	613	82.8	793	94.4	225	23.2
THEFT BY SERVANTS PUBLIC SERVANTS	880	179.6	749	141.3	762	131.4	391	60.1	407	55.0	1340	159.5	1714	176.7
STOCK THEFT	241	49.2	266	50.2	257	44.3	18	2.8	19	2.6	320	38.1	145	15.0
THEFT	4955	1011.2	5001	943.6	5676	978.6	2315	356.1	2440	329.7	5932	706.2	6290	648.4
THEFT FROM THE PERSON	484	98.8	534	100.7	807	139.1	495	76.1	561	75.8	608	92.24	614	63.3
ROBBERY	839	171.2	1034	195.1	1429	246.4	841	129.4	1814	245.1	972	115.7	795	82.0
TOTAL	19,600	4,000	20,257	3,822	22,791	3,929	8,677	1,295	11,151	1,593	20,573	2,743	19,790	2,040

SOURCE: ZAMBIA POLICE ANNUAL REPORTS

TABLE 6:

NUMBER OF PERSONS TAKEN TO COURT IN LUSAKA
1978-1990 PER 100,000 POPULATION

	1978		1980		1982		1984		1986		1988		1990	
	No.	Rate	No.	Rate	No.	Rate	No.	Rate	No.	Rate	No.	Rate	No.	Rate
MURDER	117	23.9	123	23.2	144	24.8	84	12.9	8	1.1	92	10.9	31	3.2
ASSAULT	1690	344.9	1549	292.3	3233	557.4	2853	438.9	1476	199.4	1026	122.1	1080	111.3
RAPE	29	5.9	17	3.2	54	9.3	27	4.1	23	3.1	20	2.4	3	0.3
BURGLARY	377	76.9	338	63.8	864	149.0	558	85.8	686	92.7	268	31.9	154	15.9
HOUSE BREAKING	261	53.3	191	36.0	669	115.3	232	35.7	372	50.3	158	18.8	273	28.1
OTHER BREAKING	310	63.3	205	38.7	490	84.5	256	39.4	179	24.2	219	26.1	364	37.5
THEFT OF A MOTOR VEHICLE	137	27.9	76	14.3	355	61.2	145	22.5	210	28.4	64	7.6	37	3.8
THEFT BY SERVANTS PUBLIC SERVANTS	645	131.6	451	85.1	322	55.5	472	72.6	312	42.2	525	62.5	348	35.9
STOCK THEFT	77	15.7	70	13.2	77	13.3	86	13.2	84	11.3	38	4.5	36	3.7
THEFT	1429	291.6	1068	201.5	1393	240.2	1346	207.1	1030	139.2	1204	143.3	923	95.5
THEFT FROM THE PERSON	161	32.8	109	20.5	596	102.7	190	29.3	348	47.0	110	18.2	105	10.8
ROBBERY	123	25.1	100	18.7	590	101.7	165	25.4	397	53.6	153	18.2	115	11.8
TOTAL	5,356	1,093	4,297	810	8,787	1,515	6,414	957	5,125	732	3,877	505	3,469	357

SOURCE: ZAMBIA POLICE ANNUAL REPORTS

TABLE 7:

**NUMBER OF REPORTED CASES NATION-WIDE
1978-1988 PER 100,000 POPULATION**

	1978		1980		1982		1984		1986		1988	
	No.	Rate	No.	Rate	No.	Rate	No.	Rate	No.	Rate	No.	Rate
MURDER	468	8.5	583	10.3	498	8.3	569	8.9	580	8.6	683	9.5
ASSAULT	18,578	339.5	21,646	381.1	22,365	373.7	22,576	353.0	23,559	349.3	19,935	278.8
RAPE	324	6.0	347	6.1	335	5.6	341	5.3	274	4.1	288	4.0
BURGLARY	13,018	238.0	14,732	259.4	14,041	234.6	13,732	214.7	15,479	229.5	11,927	166.8
HOUSE BREAKING	6,197	113.2	5,781	101.8	5,511	92.1	5,814	90.9	6,854	101.6	5,992	83.8
OTHER BREAKING	5,522	101.0	5,211	91.7	4,992	83.4	5,680	88.8	6,138	91.0	4,728	66.1
THEFT OF A MOTOR VEHICLE	2,012	36.7	1,322	23.3	1,568	26.0	1,173	18.3	1,302	19.3	862	12.0
THEFT BY SERVANTS PUBLIC SERVANTS	3,992	73.0	3,484	61.3	3,398	56.7	3,613	56.5	3,926	58.2	796	10.7
STOCK THEFT	1,442	26.3	1,699	30.0	1,498	25.0	1,787	27.9	1,985	29.4	1,951	27.3
THEFT	17,730	324.0	17,288	304.4	17,336	289.6	19,296	301.7	22,831	338.5	20,566	287.5
THEFT FROM THE PERSON	2,490	45.5	2,941	51.8	3,136	52.4	3,293	51.5	3,087	45.8	2,440	34.1
ROBBERY	2,264	41.4	2,645	46.6	3,437	57.4	3,567	55.8	4,426	65.6	2,767	38.7
TOTAL	74,037	1,353	77,679	1,367	78,115	1,305	81,441	1,273	90,441	1,340	72,935	1,020

SOURCE: ZAMBIA POLICE ANNUAL REPORTS

TABLE 8:

**NUMBER OF PERSONS TAKEN TO COURT NATION-WIDE
1978-1988 PER 100,000 POPULATION**

	1978		1980		1982		1984		1986		1988	
	No.	Rate	No.	Rate	No.	Rate	No.	Rate	No.	Rate	No.	Rate
MURDER	555	10.1	648	11.4	632	10.5	616	9.6	682	10.1	785	11.0
ASSAULT	7,544	137.8	7,557	133.1	8,807	147.1	8,519	133.2	7,284	108.0	4,185	58.5
RAPE	126	2.3	119	2.1	132	2.1	144	2.2	134	2.0	136	2.0
BURGLARY	1,985	36.3	2,146	37.8	2,815	47.0	2,057	32.2	2,877	42.6	1,999	27.9
HOUSE BREAKING	1,310	24.0	1,465	25.8	1,690	28.2	1,332	20.8	1,694	25.1	1,453	20.3
OTHER BREAKING	1,326	24.2	1,178	20.7	1,456	24.3	1,296	20.3	1,438	21.3	1,324	18.5
THEFT OF A MOTOR VEHICLE	227	4.1	202	3.5	515	8.6	269	4.2	313	4.6	165	2.3
THEFT BY SERVANTS PUBLIC SERVANTS	2,605	47.6	2,294	40.4	2,057	33.6	2,148	33.6	2,073	30.7	2,212	30.9
STOCK THEFT	548	10.0	608	10.7	574	9.6	678	10.6	1,648	24.4	798	11.2
THEFT	6,794	124.1	5,609	98.8	5,608	93.7	5,921	92.6	5,299	78.6	6,100	85.3
THEFT FROM THE PERSON	300	5.5	574	10.1	776	13.0	644	10.1	807	12.0	522	7.3
ROBBERY	411	7.5	439	7.7	1,020	17.0	602	9.4	911	13.5	582	8.1
TOTAL	23,731	433	22,839	402	26,082	435	24,226	378	25,090	371	20,261	283

SOURCE: ZAMBIA POLICE ANNUAL REPORTS

TABLE 9 AGE OF OFFENDERS AGAINST CHARGE (Case Records) .

		Charge					
		0	1	2	3	4	5
		-----	-----	-----	-----	-----	-----
A g e	00	0	1	1	0	0	0
	11	0	0	0	0	0	1
	13	0	0	0	0	0	0
	14	0	0	0	0	0	0
	15	0	0	0	0	0	1
	16	0	0	2	0	0	1
	17	0	0	4	0	1	1
	18	0	4	1	1	0	0
	19	0	11	10	0	0	8
	20	0	3	12	0	0	2
	21	2	5	12	0	1	5
	22	0	4	13	0	0	4
	23	1	5	13	4	0	2
	24	0	2	7	2	0	7
	25	0	3	17	0	0	4
	26	1	2	8	4	0	6
	27	0	3	8	0	0	1
	28	0	1	7	1	0	1
	29	0	2	7	4	0	2
	30	0	2	6	2	1	2
	31	0	1	4	2	2	3
	32	0	1	6	3	1	0
	33	0	0	3	1	0	2
	34	0	1	4	1	0	0
	35	0	0	2	0	0	0
	36	0	0	3	1	1	0
	37	0	0	3	0	0	0
	38	0	1	0	1	0	0
	39	0	0	3	1	0	0
	40	1	0	1	1	0	1
	41	0	0	1	0	1	0
	42	0	0	2	0	0	0
	43	0	1	2	1	0	0
	44	0	0	2	0	0	0
	45	0	0	3	0	0	0
	46	0	0	0	0	0	0
	47	0	0	0	0	0	1
	48	0	0	1	1	0	0
	49	0	0	0	0	1	0
	50	0	1	1	0	0	0
	51	0	0	0	1	0	0
	52	0	0	0	0	0	0
	53	0	0	1	0	0	0
	55	0	0	1	0	0	0
	56	0	0	1	0	0	0
	57	0	0	1	0	0	0
	60	0	0	1	0	0	0
	67	0	0	0	0	0	1
ALL		5	54	174	32	9	56

TABLE 9 CONTINUED.

	6	7	8	ALL
	-----	-----	-----	-----
00	2	0	0	4
11	0	1	0	2
13	1	1	0	2
14	0	5	0	5
15	0	6	0	7
16	7	4	0	14
17	6	5	0	17
18	8	4	0	18
19	9	10	1	49
20	13	7	0	37
21	11	5	1	42
22	8	5	0	34
23	7	6	1	39
24	7	4	1	30
25	8	2	0	34
26	3	2	0	26
27	1	0	0	13
28	2	2	0	14
29	3	4	0	22
30	6	1	0	20
31	0	1	0	13
32	5	1	0	17
33	0	1	0	7
34	6	1	0	13
35	2	0	0	4
36	2	0	0	7
37	2	0	0	5
38	0	0	0	2
39	0	0	0	4
40	0	1	1	6
41	0	0	1	3
42	1	0	0	3
43	0	0	0	4
44	1	0	0	3
45	0	0	0	3
46	1	0	0	1
47	0	0	0	1
48	0	0	0	2
49	0	0	0	1
50	0	0	0	2
51	0	0	0	1
52	1	0	0	1
53	0	0	0	1
55	0	0	0	1
56	0	0	0	1
57	0	0	0	1
60	0	0	0	1
67	0	0	0	1
ALL	123	79	6	538

TABLE 9 CONTINUED.

Key:

Charge

Theft of a Motor-vehicle.....	0
Theft from the Person.....	1
Theft by Servants.....	2
Theft by Public Servants.....	3
Stock Theft.....	4
Theft from a Motor-vehicle.....	5
Burglary.....	6
House Breaking.....	7
Robbery.....	8

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TABLE 10:

EDUCATIONAL LEVELS

OF THE 100 INTERVIEWED OFFENDERS

EDUCATIONAL LEVEL	OFFENCE CATEGORIES			TOTAL	PERCENT
	A	B	C		
	Theft including stock & Motor Vehicle Theft	Burglary & all Breakings	Robbery & Aggravated		
Never been to School	9	-	1	10	10%
Grade 7 and below	28	20	4	52	52%
Between Grade 8 and Grade 10	15	9	2	26	26%
Between Grade 11 and Grade 12	7	1	3	11	11%
Upto College/ University	1	-	-	1	1%
TOTAL	60	30	10	100	100%

TABLE 11 OCCUPATION OF OFFENDERS AGAINST CHARGE (Case Records) .

		Charge					
		0	1	2	3	4	5
		-----	-----	-----	-----	-----	-----
O	00	2	27	1	0	2	19
c	01	0	4	0	0	3	3
c	02	0	2	39	1	2	0
u	03	0	1	2	0	0	2
p	04	1	5	0	0	0	4
a	05	1	0	28	5	0	4
t	06	0	0	5	6	0	0
i	07	0	0	0	0	0	1
o	08	0	0	0	0	0	0
n	09	0	3	63	14	2	7
	10	0	0	1	0	0	0
	11	0	0	2	0	0	1
	12	0	0	1	0	0	0
	13	1	1	7	1	0	1
	14	0	6	0	0	0	2
	15	0	2	2	0	0	2
	16	0	0	2	1	0	0
	18	0	0	2	0	0	0
	19	0	0	3	0	0	1
	20	0	0	1	0	0	1
	21	0	0	0	0	0	0
	24	0	0	1	0	0	2
	25	0	1	2	0	0	0
	26	0	0	0	0	0	0
	27	0	0	6	0	0	0
	28	0	0	2	1	0	0
	30	0	0	0	2	0	0
	31	0	0	3	1	0	0
	66	0	0	0	0	0	2
	77	0	1	0	0	0	1
	88	0	0	0	0	0	2
	99	0	1	1	0	0	1
ALL		5	54	174	32	9	56

TABLE 11 CONTINUED

	6	7	8	ALL
	-----	-----	-----	-----
00	61	39	2	153
01	2	2	0	14
02	8	6	0	58
03	2	2	0	9
04	7	3	1	21
05	4	2	0	44
06	0	0	0	11
07	0	0	0	1
08	2	1	0	3
09	7	8	2	106
11	2	1	0	4
12	0	0	0	3
13	0	0	0	1
14	3	1	0	15
15	5	0	0	13
16	1	0	0	7
17	2	0	0	5
18	0	0	0	2
19	0	0	0	4
20	1	1	0	4
21	1	0	0	1
24	0	0	0	3
25	0	0	0	3
26	1	0	0	1
27	1	0	0	7
28	0	1	0	4
30	0	0	0	2
31	1	1	0	6
66	1	0	0	3
77	0	0	0	2
88	10	8	1	21
99	1	3	0	7
	123	79	6	538

TABLE 11 CONTINUED

Key:

Occupation

Unemployed.....	00
Farmer.....	01
House Servant.....	02
Carpenter.....	03
Market Trader.....	04
Security Guard.....	05
Clerical Worker.....	06
Plumber.....	07
Bricklayer.....	08
General Worker.....	09
Sales Worker.....	10
Tailor.....	11
Shoe Repairer.....	12
Driver.....	13
Businessman.....	14
Machine Operator.....	15
Printer/Painter.....	16
Teacher.....	17
Fitter/Turner.....	18
Electrician.....	19
Mechanic.....	20
Panel Beater.....	21
Foreman.....	22
Secretary/Typist.....	23
Welder.....	24
Musician/Artist.....	25
Radio/Watch Repairer.....	26
Service Worker.....	27
Bus Conductor.....	28
Accountant/Manager.....	29
Soldier/Police man.....	30
House wife/Cook.....	31
<u>Mishanga</u> (Cigarette) Seller.....	66
Self Employed.....	77
Student.....	88
Not Stated.....	99

Charge

Theft of a Motor-vehicle.....	0
Theft from the Person.....	1
Theft by Servants.....	2
Theft by Public Servants.....	3
Stock Theft.....	4
Theft from a Motor-vehicle.....	5
Burglary.....	6
House Breaking.....	7
Robbery.....	8

TABLE 12 RESIDENCE OF OFFENDERS AGAINST CHARGE (Case Records) .

		Charge					
		0	1	2	3	4	5
		-----	-----	-----	-----	-----	-----
R	1	0	0	11	0	0	0
e	2	0	3	2	0	0	0
s	3	3	40	104	30	1	44
i	4	1	3	14	2	0	4
d	5	0	2	39	0	2	3
e	6	0	5	0	0	2	2
n	7	1	1	1	0	0	2
c	8	0	0	3	0	4	1
e	ALL	5	54	174	32	9	56

7	6	7	8	ALL
-----	-----	-----	-----	-----
1	1	2	0	14
2	2	4	0	11
3	84	47	4	357
4	16	11	1	52
5	8	8	1	63
6	4	3	0	16
7	7	2	0	14
8	1	2	0	11
123	79	6	538	

Key:

Residence

High Cost Areas.....	1
Medium and Low Cost Areas.....	2
Site and Service and Upgraded Squatter Areas.....	3
Squatter Areas.....	4
Farm Areas.....	5
Village (Around Lusaka).....	6
No Fixed Abode.....	7
Outside Lusaka.....	8

Charge

Theft of a Motor-vehicle.....	0
Theft from the Person.....	1
Theft by Servants.....	2
Theft by Public Servants.....	3
Stock Theft.....	4
Theft from a Motor-vehicle.....	5
Burglary.....	6
House Breaking.....	7
Robbery.....	8

TABLE 13 OCCUPATION OF OFFENDERS AGAINST RESIDENCE. (Case Records).

		Residence					
		1	2	3	4	5	6
		-----	-----	-----	-----	-----	-----
O	00	1	5	107	16	6	4
c	01	0	0	4	0	1	7
c	02	8	1	32	2	11	2
u	03	0	0	9	0	0	0
p	04	0	0	15	6	0	0
a	05	2	0	29	7	6	0
t	06	0	0	10	1	0	0
i	07	0	0	1	0	0	0
o	08	0	0	2	0	0	1
n	09	1	1	61	6	32	2
	10	0	0	3	1	0	0
	11	0	0	3	0	0	0
	12	0	0	1	0	0	0
	13	0	1	10	1	2	0
	14	0	0	10	2	0	0
	15	0	1	3	1	2	0
	16	0	0	4	1	0	0
	18	0	0	2	0	0	0
	19	0	0	1	2	0	0
	20	0	1	3	0	0	0
	21	0	0	1	0	0	0
	24	0	0	3	0	0	0
	25	0	0	3	0	0	0
	26	0	0	1	0	0	0
	27	1	0	4	2	0	0
	28	0	0	3	0	1	0
	30	0	0	2	0	0	0
	31	0	0	4	2	0	0
	66	0	0	3	0	0	0
	77	0	0	2	0	0	0
	88	1	1	16	1	1	0
	99	0	0	5	1	1	0
ALL		14	11	357	52	63	16

TABLE 13 CONTINUED.

	7	8	ALL
	-----	-----	-----
00	11	3	153
01	0	2	14
02	0	2	58
03	0	0	9
04	0	0	21
05	0	0	44
06	0	0	11
07	0	0	1
08	0	0	3
09	2	1	106
10	0	0	4
11	0	0	3
12	0	0	1
13	0	1	15
14	0	1	13
15	0	0	7
16	0	0	5
18	0	0	2
19	0	1	4
20	0	0	4
21	0	0	1
24	0	0	3
25	0	0	3
26	0	0	1
27	0	0	7
28	0	0	4
30	0	0	2
31	0	0	6
66	0	0	3
77	0	0	2
88	1	0	21
99	0	0	7
	14	11	538

TABLE 13 CONTINUED.

Key:

Occupation

Unemployed.....	00
Farmer.....	01
House Servant.....	02
Carpenter.....	03
Market Trader.....	04
Security Guard.....	05
Clerical Worker.....	06
Plumber.....	07
Bricklayer.....	08
General Worker.....	09
Sales Worker.....	10
Tailor.....	11
Shoe Repairer.....	12
Driver.....	13
Businessman.....	14
Machine Operator.....	15
Printer/Painter.....	16
Teacher.....	17
Fitter/Turner.....	18
Electrician.....	19
Mechanic.....	20
Panel Beater.....	21
Foreman.....	22
Secretary/Typist.....	23
Welder.....	24
Musician/Artist.....	25
Radio/Watch Repairer.....	26
Service Worker.....	27
Bus Conductor.....	28
Accountant/Manager.....	29
Soldier/Police man.....	30
House wife/Cook.....	31
<u>Mishanga</u> (Cigaratte) Seller.....	66
Self Employed.....	77
Student.....	88
Not Stated.....	99

Residence

High Cost Areas.....	1
Medium and Low Cost Areas.....	2
Site and Service and Upgraded Squatter Areas....	3
Squatter Areas.....	4
Farm Areas.....	5
Village (Around Lusaka).....	6
No Fixed Abode.....	7
Outside Lusaka.....	8

TABLE 14 COMPANIONSHIP AT CRIME (Case Records) .

		Accomplice		
		1	2	ALL
		-----	-----	-----
C	0	1	4	5
h	1	14	40	54
a	2	46	128	174
r	3	6	26	32
g	4	3	6	9
e	5	17	39	56
	6	36	87	123
	7	15	64	79
	8	0	6	6
ALL		138	400	538

Key:

Charge

Theft of a Motor-vehicle.....0
Theft from the Person.....1
Theft by Servants.....2
Theft by Public Servants.....3
Stock Theft.....4
Theft from a Motor-vehicle.....5
Burglary.....6
House Breaking.....7
Robbery.....8

Companionship

Accomplice Present.....1
Accomplice Not Present.....2

TABLE 15 RECIDIVISM AMONG ALL OFFENDERS (NATION-WIDE) AGAINST
THE PENAL CODE. (In Percentages)

	1980	1981	1982	1983	1984	1985	1986
First offenders	63.5	61.1	55.0	58.7	59.1	54.5	53.2
One previous conviction	17.2	17.3	18.2	19.7	16.3	18.7	17.7
Two previous convictions	11.0	11.6	13.6	11.4	14.6	14.5	15.8
Three or more previous convictions	8.3	10.0	13.2	10.2	10.0	12.3	13.3
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0

SOURCE: Prisons Department Annual Reports.

TABLE 16: RECIDIVISM AMONG THE 100 INTERVIEWED OFFENDERS

RECIDIVISTS

Offence categories	First Offenders	Offenders with Police Record Only	Offenders whose cases were withdrawn in court	Total number of recidivists	One previous convictions	Two previous convictions	Three previous convictions	Over three previous convictions	Total number of offenders
Theft (including stock and motor vehicle theft)	37	3	-	20	18	-	2	-	60
Burglary (including all breakings)	15	6	3	6	4	1	-	1	30
Robbery (simple & aggravated)	3	1	-	6	6	-	-	-	10
Total	55	10	3	32	28	1	2	1	100
Percentages	55%	10%	3%	32%					

CHAPTER 4

PRE-TRIAL PROCEDURE : THE POLICE AND THE CONSUMERS OF CRIMINAL JUSTICE.

4:1 The Law of Arrest

Any police officer may without a warrant arrest any person whom he suspects upon reasonable grounds of having committed a cognizable offence. A police officer in charge of a police station may arrest or order the arrest of a person who by repute is an habitual robber, house breaker or a thief.

.....

A person arrested without a warrant for an offence other than one punishable by death should be taken to court within 24 hours unless the offence alleged against him is of a "serious nature". If it is not practicable to take him to court within that period, he should be released on police bond with or without sureties for a reasonable sum.

A police officer may also arrest with a warrant. A warrant of arrest is issued by a magistrate. It contains the name of the accused person, the offence he is alleged to have committed and the name of the police officer commanded to execute it. It also contains information relating to the time and the place of the offence. An arrested person is brought before the magistrate who issued the warrant or before another magistrate who may decide to release him on bail or commit him to custody.

In general, a police officer may arrest a person who commits a non-cognizable offence only with a warrant. He may, however, arrest any person without a warrant if a non-cognizable offence

is committed in his presence and the officer believes that if the suspect is not arrested there and then, it may be difficult to⁴ trace the suspect and bring him to court for trial. In practice, a warrant of arrest is only issued for the arrest of a person who jumps bail.

⁵
A private person and a vigilante may also exercise power of arrest. If the alleged offence is a cognizable offence, it must have been committed in the presence of the private person or the vigilante making the arrest. On the other hand, if the alleged offence is a felony as all property offences are, the private person or the vigilante making the arrest must reasonably suspect⁶ that such an offence has been committed.

A private person or a vigilante must immediately after arrest, hand over the suspect to a police officer. In the absence of a police officer, he must take the suspect to the nearest police station. The police officer to whom a suspect is handed may re-arrest him if it appears that he has committed an offence or he⁷ may release him if no offence has been committed.

A magistrate may personally exercise the power of arrest or he may order the arrest of a person committing an offence in his presence. After making an arrest, he may release the suspect on⁸ bail or commit him to custody pending a court appearance. A rather interesting provision is the one imposing a legal duty on all private individuals to come to the aid of a police officer or a magistrate in the taking or preventing the escape of a⁹ person arrested by him. This provision seems to conflict with an

established principle of law that the duty of a citizen to assist¹⁰
police investigation is a social rather than a legal one.

The main purpose of arrest is to ensure that the defendant attends the court proceedings should there be a prosecution. The prevention of commission of further offences is also an important consideration. The alternative to arrest is to summon the defendant to appear at the court, a process which consumes fewer¹¹ police resources and causes less inconvenience to the suspect. The summonses procedure is never used for property offenders in Lusaka, but it is frequently used for offenders under the Roads and Road Traffic Act (Cap 766 of the Laws of Zambia). The main reason for this is the operational problems that the police encounter in the execution of summonses as will be seen later in this thesis (chapter 5). The other reason is that many police officers hold the view that property offenders are most unlikely to respond to such summonses.

4:2 The Role of the Police in the Arrest of Suspects.

In 1967, Reiss and Bordua, American researchers developed the terminology "pro-active" and "reactive" in describing the nature of police work. The police role is characterised as reactive where members of the public are responsible for bringing the incidents that result in the arrest of suspects to the attention of the police. On the other hand, the police role is termed proactive when police officers upon their own initiative discover¹² incidents that result in the arrest of suspects.

Since then subsequent research particularly in England and

Wales has confirmed that the arrest of most suspects rests heavily on the evidence provided by members of the public. The members of the public who provide information to the police are either the victims themselves or other civilian witnesses. In 1976, Bottomley and Coleman¹³ found that the police on their own discovered only 13% of the incidents leading to arrests. Four years later, in 1980, Softley¹⁴ found that only in 20% of the arrests was the information provided by police officers. In 1982, McConville and Baldwin¹⁵ found that police activities led to the arrest of suspects in 34% of the cases. In his 1984 study at Worcester Crown Court, Mitchell found that in 72.3% of the cases, the sources from which the police first heard of the offence were: the victim, the victim's relatives and passersby or other witnesses. The police were the source of the information leading to the arrest by being "there at the right time" in only 8.3% of the cases. In the rest of the cases, information was provided by the informant, professional person, or friend of the defendant.¹⁶

In this study, an effort was made to discover the role played by police officers on the one hand and that played by the victims or other members of the public on the other in the arrest of suspects. Interviews of offenders and discussions with police officers provided much of the evidence for this analysis. The results of interviews of offenders are presented in Table 17.

It can be seen from (columns 1-2 Table 17) that it was only in 5% of the cases that the police on their own discovered incidents which led to the arrest of suspects. In the rest of the cases representing 95% (columns 3-7) it was either the victim or a

civilian witness or a co-offender or a vigilante who identified the suspect or provided information which led to the arrest of the suspect.

In this study, the police did not catch any of the offenders in the act. Many offenders easily explained that by saying that they took care to make sure that the police were not in sight when they committed the offences for which they were convicted. Others committed offences in work places away from the normal areas of police patrols. On the other hand, police officers blamed their inability to catch offenders in the act on the lack of police visibility and patrols on the streets and in residential areas. A serious manpower shortage was reported at all the four Police Stations visited in Lusaka. At Matero Police station, for example, the writer heard that out of an establishment of 40 detectives, the station had a strength of only 18 officers, 12¹⁷ of whom were trainees.

The 5% of the arrests in which the police identified offenders on their own did not necessarily result from investigation of reported cases. Most of those arrests generally resulted from normal police duties as the following case illustrates:

"Within minutes of removing a handbag from a parked car in the city centre, my friend and I got on a mini bus to Long Acres, (east of Lusaka city centre). At Long Acres, we saw a police car with 3 armed policemen inside- the anti-robbery squad. I had the handbag in my hands. The police ordered us to stop. They then asked me where I got the handbag whose contents by then I had not yet seen. I had no answer. They grabbed the handbag from me, opened it and inside were K6,575, a £20 note, 10 Tanzanian Shillings, a passport, letters and a pay slip. They then took us to the Police Station."¹⁸

4:3 The Role of the Consumers of Criminal Justice in the Arrest of Suspects.

It has already been mentioned that 95% of the arrests in this study resulted from information supplied to the police by members of the public. Discussions with senior police officers confirmed this heavy reliance on members of the public, but none of the 5 police officers interviewed was specific in their estimates of the extent of the public support. It was, however, estimated that on average, 83% of the arrests for property offences at each of the 4 Police Stations visited resulted from information¹⁹ received from members of the public. In the following section, we examine the role played by various segments of the public or the consumers of criminal justice in the arrest of offenders in this study as shown in Table 17.

4:3 (a) Victims or Other Witnesses.

In 53% of the cases information which led to the arrest of offenders was provided by the victim or other witness. Analysis of interviews of offenders revealed that the offender and the victim were already known to each other (either from present or past contacts) arising out employee-employer relationship. Thus 31 of the 53 offenders who were identified in this way (i.e column 6 in Table 17) were convicted of theft by servants or by public servants. Those offenders were either identified by the employer himself or by the employer's representative, ie his supervisor at the place of work, or by the²⁰ guard or by fellow work mates in the work group.

It may be pointed out that cases in which the offender and the

victim were already known to each other were not confined to theft by servants and by public servants alone. In the case of theft, half of the offenders (column 6 Table 17) were known to²¹ their victims either as business partners, or as old acquaintances.²² It may also be mentioned that 2 of the 3 offenders²³ under robbery and aggravated robbery (column 6 Table 17) and 3²⁴ of the 5 offenders under burglary (column 6 Table 17) committed the offences against their former employers, who subsequently provided the police with their names.

4:3(b) Accomplices.

Interrogation of alleged accomplices led to the identification²⁵ and arrest of 25% of the offenders in this study. This was particularly pronounced in the case of serious offenders. It is evident from (column 4 Table 17) that half of the offenders in both house breaking and burglary, for instance, were arrested as a result of information extracted through interrogation of the co-offender. It may be recalled that the analysis of offending patterns in Chapter 3 showed that burglary and house breaking offenders, more than any other group of offenders,²⁶ offended in groups of 3-4 accomplices. It will be shown in the later section of this chapter that obtaining information from the suspect on the whereabouts of his accomplice(s) is one of the purposes of interrogation. Two cases may be cited here as typical examples of how arrests were made after the interrogation of an accomplice:

Case 1 " Early in the morning, around 4 AM. 5 policemen, 3 of them armed came to my house led by Lika, my co-offender who had been arrested earlier. I was ordered to dress up, so was my wife (in full view of the policemen). They then

started searching my house. They found the books which they were looking for and which we had stolen from a local Primary School. They also took my radio, which was not part of the property stolen. They had no search warrant and did not ask for my permission to search the house. They took me to the Police Station."27.

Case 2 "A friend of mine, a fellow guard was caught red-handed stealing chickens from the chicken run at the College where we were guarding property. He was caught by other guards who handed him to the para-military police. At the Police Station, he mentioned my name and that of another guard and that was how I was arrested. Although I was not with my friend when he was caught, we stole chickens together from the same place several times before we were finally arrested."28.

In some of these cases (i.e, in which the offender was identified by interrogation of the alleged accomplice), the person who provided the information after interrogation upon which the police acted was not necessarily the accomplice. The informer was²⁹ in some cases either a "customer" of the stolen goods or "an agent" who offered to sell goods on behalf of the offender at a fee as the following case illustrates:

"Among the stolen goods was a set of golf clubs. I had a friend who was a caddy at the Lusaka Golf Club. He offered to sell the clubs for me. Apparently his potential customer turned out to be the owner of the golf clubs. My friend was taken to the Police Station where he mentioned my name after interrogation. The police then released him and used him to get me. He came home and told me that he had found a customer for me and that I should accompany him to the Lusaka Golf Club to get the money. Unknown to me, the police were waiting for me there and they arrested me."30.

4:3(c) Vigilantes.

The vigilantes will be discussed in detail in Chapter 8 but they may be mentioned briefly here regarding their role in the arrest of suspects. The vigilantes were created 1985, as a result of an amendment to The Zambia Police Act (Cap 133 of the Laws of Zambia). The amendment abolished the special constabulary scheme

and in its place created the vigilante scheme.

In this study, 7% of the offenders were arrested by vigilantes as shown in Table 17. The majority of the 7% were those convicted of burglary. The vigilantes are poorly organised but they do supplement police efforts especially in squatter and up-graded squatter areas. Most of the people likely to be arrested by the vigilantes are those with an already bad reputation in the neighbourhood, or those with criminal records. Others are those whose behaviour after committing an offence becomes suspicious as the following case illustrates:

"My friend and I broke into a house and stole K20,000. of which I got K10,000. as my share. I went shopping. Later I hired a taxi and went for a drink, moving from one bar to the other. Each time I stopped at a bar, the taxi would be waiting for me. I was buying beer for many people some of whom I did not even know. At one bar the vigilantes arrested me together with the taxi driver. At the Police Station, the taxi driver was allowed to go."32.

It has been shown in this study that the police in Lusaka rely very much on the members of the public in getting information leading to the arrest of property offenders. In the past, although the reliance on the public was acknowledged by the police themselves, its extent was unknown. This study has shown that around 95% of the arrests were as a result of information provided by the victims, or other civilian witnesses. Professor Reiner's observation about the British police is equally true of their Zambian counterparts. He says: "That the police take a leading role in ...crime detection is one of the mythologies about policing".

The extent of police dependence on victims and other witnesses for information leading to the arrest of suspects was more pronounced in some cases than in others. It was more pronounced in theft by servants and by public servants. The reason, obviously, was because of the existing or prior ties between the offender and the victim. It was less pronounced in burglary, probably because the nature of the offence makes it difficult for the victim or any civilian witness to identify the offender. As Table 17 shows, interrogation of the alleged accomplices was the means by which most of those convicted of burglary were identified and arrested.

4:4 The Question of Bail

The right to bail is enshrined in Article 13(3))b) of the Constitution which states as follows:

"Any person who is arrested or detained....and who is not tried within reasonable time, then without prejudice to any further proceedings that may be brought against him... shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial".

Further, the question of freedom before one is convicted is embodied in the presumption of innocence, also a constitutional right enshrined in Article 18(2)(a) which states: "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty".

Other provisions relating to bail are contained in the C.P.C. Most offences in Zambia are bailable except murder, treason and aggravated robbery. Offences under the State Security Act are also bailable generally, unless the D.P.P is of the view that the

grant of bail is likely to prejudice the safety or interests of
34
the state.

Any person arrested for any offence, either than the ones mentioned above, may be granted bail either by a police officer or by a magistrate at any stage of the proceedings, upon his production of a surety or sureties. An arrested person may also be granted bail on his own recognizance. The police officer or the court releasing a suspect on bail on his own recognizance may in lieu of bail accept a deposit of money or property. The amount of bail to be imposed is within the discretion of a police
35
officer or the magistrate "but shall not be excessive".

4:4(a) Police Bail.

Case records do not state whether the defendant was denied or granted bail by the police. Information on bail practice in various police stations in Lusaka was obtained from interviews of both the offenders and police officers.

Of the 100 interviewed offenders in this study, only 11 claimed that they were allowed police bail. Thirteen of the 89 offenders who were not released on bail said that they did not ask for bail because they were not aware of its existence and the police officers made no effort to inform them of their right to bail. The rest of the offenders (ie 76 out 100) claimed that the police turned down their application for bail.

Interviews with senior police officers confirmed a general reluctance on the part of the police to allow suspects bail. The police officers were unanimous on the view that it was impossible

to trace suspects and take them to court once they were released on bail. Those arrested for property offences were singled out as the worst culprits and the police lacked manpower to track them down. It was, however, pointed out that whilst it was the policy of the police to grant bail in deserving cases, it was not their responsibility to inform every suspect of his right to bail.

At the moment the decision by the police to refuse bail is not subject to appeal or review. This matter should be looked at because the high rate of the refusal of bail contributes to congestion in police cells. It is suggested that officers-in-charge at all Police Stations in Lusaka be empowered to review all cases in which bail is requested for and refused, allegedly on their behalf. This could be a more practical alternative to a review by courts as magistrates would be flooded with such cases.

It was also discovered that most Police Stations in Lusaka have no system of informing relatives or friends of the arrest and detention of defendants. In most cases defendants are refused a phone call and news of their detention reaches their relatives or friends either through released detainees or people visiting other detainees. It is understandable in that the police, as will be seen in chapters 5 and 8, are short of transport and that the communication system is poor in Lusaka. However, where possible, the police should ensure that no detainee is held incommunicado.

4:4 (b) Court Bail.

Court records from magistrates' courts do indicate whether the defendant was granted bail or not and the conditions attached to

it, but they do not specify reasons for refusal of bail. Case records in this study showed that magistrates in Lusaka rarely granted bail to property offenders on their own recognizances. The standard procedure requires the defendant to produce two working sureties and a deposit of money. The two working sureties are also required to deposit a similar amount of money to that deposited by the defendant.

There are two main objections advanced by the prosecution to the application for bail. The first objection is based on the ground that the defendant, once granted bail, would be unlikely to appear for his trial. The second objection is based on the ground that the defendant would interfere with the course of justice, such as by destroying evidence or by threatening witnesses. In practice, magistrates in Lusaka seem simply to assume the existence of these grounds. In other words, evidence on the basis of these grounds is rarely sought from the prosecution.³⁶

One of the major findings about bail practice elsewhere is that defendants who are refused bail are not only more likely to be convicted but are also more likely to be sentenced to imprisonment³⁷ than those granted bail. In this study, 311 or 27% of all the 1129 defendants whose case records were studied were granted bail and 817 or 72% were remanded in custody during the course of trial as Table 18 shows. That table also shows that 82.5% of those who were convicted were remanded in custody. Interviews of imprisoned offenders revealed that only 16% were granted bail, the remaining 84% were remanded in custody, despite

the fact that 85% of them had applied for bail. On the other hand, 61.5%, 64.1% and 53% of the defendants who were acquitted, whose cases were withdrawn and dismissed, respectively, were remanded in custody. It may be said that magistrates had assessed the strength of evidence against those defendants who were finally convicted, hence the high number of defendants refused bail in that group of offenders. It has been pointed out, for instance, in England that where evidence against the defendant is compelling, the likelihood of conviction could remove the incentive to appear on the part of the defendant, which in turn would influence the decision to refuse bail. But this approach seems to contradict the presumption of innocence seen earlier.

Another interpretation of bail practice in Lusaka magistrates' courts could be that defendants granted bail in this study were more likely to prepare their defence than those remanded in custody. But evidence shows that only 3% of defendants were legally represented. Although many of those who were legally represented were more likely to be granted bail in the course of the trial, their numbers were too small to establish an association between legal representation and the likelihood of the grant of bail. The fact of the matter, however, is that this study has found some evidence of an association between the refusal of bail and the likelihood of conviction, although the two decisions are always arrived at independently in individual cases.

The fact that so many defendants (72.5%) in this study were remanded in custody puts a heavy burden on the prison

administration. In 1986, 51,568 people were admitted to prisons nation-wide, of whom 12,005 (or 23.2%) were convicted prisoners and 36,017 (or 69.8%) were admitted on remand (the rest were³⁹ admitted on detention or prohibited immigrants' orders). In Lusaka Central Prison (where interviews of prisoners were conducted), 285 of the total inmate population of 496 (or 57.3% were admitted on remand as at August 1989 (some 33 inmates were admitted on detention or prohibited immigrants' orders). This extensive use of remand contributes significantly to prison over-crowding, as it is the remand section of the Lusaka Central Prison where the over-crowding is particularly accute.

The prison in question was originally intended to accommodate 200 inmates, but its population has in most cases been far beyond its capacity. In 1980, for example, its population reached 980⁴⁰ inmates and in 1986, it reached the level of 1,118 inmates.

The substantial majority of magistrates in this study (seven out of 9) informed the writer that they did not take into account the availability of accommodation in the remand prison when considering the question of bail. They felt that the question of accommodation for both the remanded and convicted prisoners was for the prison authorities to consider. In other words, there is no relationship between the availability of space in the remand prison and the rate of remand orders.

Despite the heavy use of remand as a way to ensure the attendance of defendants at their trial, available evidence seems to suggest otherwise. Failure to appear in court while on remand

in custody is one of the major contradictions in the administration of criminal justice in magistrates' courts in Lusaka. The main reason for this is lack of transport or fuel on the part of the police who are charged with the responsibility to ferry the remanded defendants from the Lusaka Central Prison, Remand Prison or from various Police Stations around Lusaka to the two court sites. The other reason is lack of coordination of in the use of transport between the Lusaka Central Prison and the various Police Stations in Lusaka. It is generally known that the Prisons Department, partly because of its being a smaller unit, has more transport than the Police Force. No effort, however, is made on the part of the former to assist the latter even in circumstances where such assistance would normally be expected, for instance, in ferrying inmates to the two court sites. In chapter 5, it will be shown that the lack of transport on the part of the police, as well as the lack of coordination between themselves and the prison authorities on the question of transport, adversely affects the operation of the courts in Lusaka.

As mentioned above, research evidence elsewhere suggests an association between the refusal of bail and the likelihood of the imposition of a custodial sentence. In England, for example, an urban and a rural study by Professor Bottomley found that 23% of the defendants on bail were imprisoned, compared to 48% who were remanded in custody during the course of the committal trial. In the case of summary trials, 11% of those defendants allowed bail were given custodial sentences compared to 87% of

those remanded in custody.

This study did not find a significant association between refusal of bail and the likelihood of the imposition of a custodial sentence or between the granting of bail and the likelihood of a non-custodial sentence as Table 19 illustrates. Table 19 shows that overall, only 15.2% of those given non-custodial sentences (i.e. 28% of the 184) were granted bail⁴³ compared to 18.6% of those sentenced to imprisonment. It also shows that defendants in whose respect caning, suspended sentence and probation were ordered were remanded in custody in larger proportions than those sentenced to imprisonment. Further Table 19 shows that a larger proportion of defendants sentenced to imprisonment were granted bail than those given non-custodial sentences, except those in whose respect the fine and E.M.P.E were ordered. The number of defendants involved in the two latter disposals (a total of four) is too small for a firm conclusion on the relationship between bail or remand and the likely sentence. What seems to have emerged from this study is that although there was an association between the refusal of bail and the likelihood of conviction, there was no association between the refusal of bail and the type of sentence imposed. This probably, reflects both the lack of clear policy on bail practice and the inarticulate nature of the bail "hearings".

An interesting pattern emerges when the bail practice among imprisoned offenders is examined in relation to the type of offence. Table 20 shows that the grant of bail in relation to

persons charged with burglary, theft from the person, theft of a motor-vehicle and robbery was very rare compared to persons charged with other offences. Other than the failure of the defendants to meet bail conditions, many of those charged with the above offences might have been refused bail mainly on account of the seriousness of the offences.⁴⁴ But the denial of bail to many charged with theft from the person may not be explained in terms of the seriousness of that offence. The offence is relatively minor and it attracts a relatively lower sentence as will be seen in chapter 6. It will also be seen in chapter 6 that magistrates in this study sentenced offenders convicted of theft from the person more severely than those convicted of theft by servants and by public servants even though the two latter offences carry a relatively heavier sentence. It is this sentencing attitude towards offenders convicted of theft from the person which probably explains why magistrates rarely granted them bail.

It has been reported elsewhere that most of the defendants remanded in custody plead guilty in order to have their cases dealt with in the shortest possible time. One English study, for instance, found that 61% of those remanded in custody for trial by higher courts pleaded guilty compared to 36% of those granted⁴⁵ bail.

A similar picture emerges in this study as Table 21 illustrates. Table 21 shows that 229 out of the 538 convicted defendants pleaded not guilty, of whom 34.5% were allowed bail and 65.1% were remanded in custody. On the other hand, 308 of the 538

defendants pleaded guilty, only 4.9% of them were allowed bail and 95.1% were remanded in custody.

Of the 100 interviewed offenders, 55% pleaded guilty, the majority of whom were remanded in custody. Their reasons for pleading guilty, as will be seen further in chapter 6 were wide and varied. A significant proportion of those offenders claimed that they pleaded guilty because they wanted the case to be finalised as soon as possible, not necessarily because they were remanded in custody, but because they wanted to protect their gang members. Others tendered the plea of guilty because they did not want investigations which would have led to the recovery of stolen property. On the other hand, the effects of prolonged periods of remand, such as the progressively bad diet, increasing over-crowding and possible loss of career could have induced a plea of guilty in some defendants in the hope that a quick disposal of their cases might alleviate their plight. As already mentioned above, it is the remand section of the Lusaka Central Prison which is most over-crowded.

The major consideration in the decision to grant or the refuse bail is whether the defendant will be able to appear at his trial. A remand in custody on that ground is supposedly the most effective way to ensure the defendant's appearance. Available evidence to be seen later (chapter 5) shows that failure to appear in court for defendants on bail is rare. On the other hand failure to appear for defendants in custody is a chronic problem, owing to the police operational problems. Many defendants are therefore being unjustifiably remanded in custody and at a

cost which cannot be justified.

In practice magistrates do not grant bail on the defendant's own recognizance, but on the production of two working sureties in court. Due to poor communications in Lusaka, many defendants are unable to contact their potential sureties. This requirement is also unrealistic in view of the high unemployment in Lusaka and in the whole country. Case records as well as interviews of offenders revealed that most offenders were either unemployed or only marginally employed (chapter 3). In addition, interviews of offenders revealed that the social status of potential sureties (close relatives and friends) was not so different from that of offenders themselves. Bail practice therefore (like some court procedures to be seen in chapter 5) works against the poor defendants. In the eyes of many of them, it is the wealth of the defendant which more than anything else determines whether or not freedom before judgment can be secured. The whole question of bail needs a fresh approach.

4:5 Police-Suspect Encounter: The Process of Interrogation.

The right to silence which is based on the common law doctrine that no one should be compelled to incriminate himself has been adopted in Zambia.⁴⁶ The right to silence entails the right to refuse to answer police questions and also the right not to testify at one's own trial.⁴⁷ The Zambian criminal justice system has also adopted the English Judges Rules to guide the police in their questioning of suspects held in their custody.⁴⁸

The Judges Rules empower police officers to question anyone

whether suspect or not from whom they believe that useful information about crime can be obtained. The other important aspect of the Judges Rules is the requirement that a suspect should be cautioned twice during the course of the interrogation. Firstly, the suspect should be cautioned before any question is put to him by telling him that he does not have to answer any question. Secondly, he should be formally cautioned after being charged by telling him that he need not say anything, but ⁴⁹ whatever he says may be used as evidence against him in court.

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4:5(a) The Suspect's Perspective.

In this study, an effort was made to get evidence from both the police and offenders on the implementation of the Judges Rules. Of the 100 interviewed offenders only 16 said that they were cautioned at the time of arrest and before questioning began. But none of the 16 offenders said they were cautioned for second round of questioning, i.e, after being charged. The rest of the offenders, i.e 84 out of 100, were not cautioned at all. Many of the 84 offenders did not even understand what cautioning was all ⁵⁰ about.

The senior police officers interviewed were of the view that cautioning was administered in cases where a senior police officer was the one interrogating the suspect. Young and inexperienced officers tended to be overzealous and therefore overlooked the established procedures. All the police officers admitted in various degrees that cautioning generally tended to interrupt the flow of questioning. It was made clear by the police officers that the vast majority of suspects were eager to

talk as soon as they arrived at the police station. It was not therefore in the interest of the suspect in those circumstances to tell him that he had a right to remain silent.

An earlier study found that 66% of offenders for all crimes were assaulted in Police Stations in Kabwe, Lusaka and Livingstone during interrogation. The nature of assault was slapping and kicking (36%) and causing of actual bodily injury(30%). The same study reported that 9% of the offenders were threatened with assault and that only 25% of the offenders said that they were well treated in police custody.⁵¹

Results of the present study on the treatment of offenders in police custody during the process of interrogation are presented in Table 22. It can be seen from the Table 22 that 38% of the offenders were assaulted in the Police Station: i.e they were slapped, kicked or whipped with a belt or a stick. Thirty-one percent of the offenders were additionally subjected to a form of assault known among offenders and police officers alike as Kampelu. One offender described the Kampelu as follows:

"One of the two police officers interrogating me brought a rod into the office and laid it in between two tables. He then produced a pair of handcuffs and tied my hands and legs together as I sat in a squatting position. He pushed the rod in between my hands and thighs. The two officers then lifted the rod as I clung to it and put it on two tables, placed apart so that my body remained suspended between the two tables. They kept me on the Kampelu for about 30 minutes. While there they kept beating me, slapping me and asking me questions about stolen motor-vehicles. They said that I should tell the truth. The pain became unbearable and I admitted the offence. They then released me."52.

It is clear from Table 22 that the vast majority of those who

were assaulted and put on the Kampelu were those charged with serious property offences. Thus whilst 3 of the 33 offenders charged with theft by servants and by public servants were assaulted and put on the Kampelu, 6 out of 10 of those charged with robbery and aggravated robbery and 10 out of 20 of those charged with burglary were assaulted and put on the Kampelu. On the other hand 15 out of 33 offenders charged with theft by servants and by public servants had not been assaulted, but none of the 10 offenders charged with robbery and aggravated robbery and only one of the 20 offenders convicted of burglary escaped assault.⁵³

It is clear from interviews of offenders that the 31% of the offenders who were not assaulted readily admitted their offences during interrogation. Many of those were brought to the Police Station by the victim, who in most cases was the employer of the offender. Interrogation in those cases was a simple exercise involving taking down personal details of the offender. Assault on suspects during interrogation was therefore partly designed to induce confessions because the police found it a cheaper option than conducting further investigations.

The experiences of the 31% of the offenders who were both assaulted and put on the Kampelu were very consistent with each other. But even though there was little room for doubt as to the truthfulness of their accounts, it was nevertheless thought desirable to verify their allegations against police officers. Consequently, views on the matter were sought from police officers and from legal practitioners in private practice and at the Attorney General's Chambers.

4:5(b) The Police Officer's Perspective.

As has already been mentioned in Chapter 1, four randomly selected Police Stations out of the 7 main Police Stations in Lusaka were visited. At each Police Station, discussions were held with a senior police officer of the rank of Chief Inspector or Detective Chief Inspector. In addition, the head of the police prosecutions branch who is of the rank of Assistant Commissioner of Police was also interviewed.

On the question of the right to silence all the 5 police officers⁵⁴ agreed that suspects did not exercise that right. Many suspects believed that chances of being released depended on asserting⁵⁵ their "innocence" as soon as they arrived at the Police Station. But unless the explanation they offered was an admission of the offence or a disclosure of the whereabouts of stolen property or the accomplice(s) or weapons or instruments used in the commission of the offence, the police were less inclined to believe any assertions of innocence. In fact the police were more likely to concentrate on the suspect who denied any knowledge of the alleged offence.

The police officers were asked to comment on the use of the Kampelu in their Police Stations without reference to any specific cases. At one station, the police officer denied that the Kampelu existed there. At another station, the officer could not deny nor confirm its use and was not keen on discussing the subject. At two Police Stations, officers agreed that the Kampelu was used but claimed that suspects tended to exaggerate the extent of its use. One of the officers put it this way:

"The Kampelu is not a strange phenomenon. It is variously used at many Police Stations. Its use depends on the kind of suspect the police are dealing with and on the type of offence and also on the kind of the police officer involved in interrogation. Some suspects would not tell the truth even after 7 days of intensive interrogation. The Kampelu usually makes them come up with the truth."56.

All the police officers, however, agreed that sometimes they compelled suspects to undergo "physical exercises" if they appeared to be "departing from the truth" in the course of interrogation. "Physical exercises" meant frog-jumping, press-ups and slaps. Whenever the Kampelu was used it was as a last resort, i.e after the "physical exercises" had failed to produce the desired results.

During interviews with police officers, it became clear that some of the reasons for the police assault on suspects were to obtain information on the whereabouts of the weapon used in the commission of the offence, if any, and also on the whereabouts of the property stolen. As to the importance attached to the recovery of stolen property in the investigation of property crime, one police officer remarked:

"Recovery of property stolen is probably the most important aspect of police investigation. Recovery of property constitutes material evidence, it signifies police efficiency and brings satisfaction to the victim. Usually information about the whereabouts of stolen property or the weapon used in the commission of the offence does not come on the silver plate. Interrogation, using some form of physical force where necessary brings the desired results."57.

4:5(c) The Legal Practitioner's Perspective

As mentioned above (chapter 1), views of 6 legal practitioners both in private practice and at the Attorney General's Chambers were sought on the matter by a questionnaire. All the 6 legal

practitioners agreed in varying degrees that the majority of suspects were assaulted in police custody during interrogation. Some of their explanations for assault on suspects confirmed views from the police officers. One of them had this to say:

"Although confessions made under duress are inadmissible, property recovered as a result of that confession is admissible in evidence. In fact if a suspect after being tortured leads the police to where property is hidden, the recovery of that property will act as a clear admission of the offence by the suspect. This state of affairs has encouraged the police to torture suspects. Further, our courts have held that property recovered during an illegal search is admissible in evidence as long as it is relevant to the matter in issue."⁵⁸.

Other legal practitioners also attributed police assault on suspects equally to the lack of training by investigators in the methods of obtaining evidence without necessarily resorting to
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the use of force. They further pointed out that members of the public had encouraged the police to be harsh with "criminals" especially armed robbers and burglars. It will be seen in chapter 8 that "instant justice" mobs are a common feature of life in Lusaka. Lastly, legal practitioners pointed out that property offenders themselves had encouraged the police to be harsh with them. Some property offenders had become so cruel and brutal in their methods of offending that the police had replied with
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equally brutal methods in dealing with them. This attitude is not peculiar to Zambian police. An English constable, for example, is reported as having told Professor Reiner that:

"Speaking from a policeman's point of view, it doesn't give a damn if we oppress law breakers, because they're oppressors in their own right".⁶¹.

All the legal practitioners warned that even though most of the

allegations about police excesses may be true, there were others which were false. False allegations of police assault were designed to arouse the court's sympathy in dealing with the particular defendant. One of the 6 respondents said:

"There are, however, times when a suspect (particularly hardcore criminals) will give free and voluntary statements to the police without being tortured. They give full cooperation to the police in order to avoid being assaulted. When the matter comes up in court, they turn round and allege that they were tortured by the police. Some even show old or childhood scars to support their allegations."62.

Nevertheless, this study has found strong evidence of police assault on suspects in their custody. Evidence from police officers themselves and from leading legal practitioners in Lusaka confirmed offenders' accounts of police assault and excesses. Offenders arrested for serious property offences such as robbery and aggravated robbery were assaulted more often than those arrested for less serious crimes such as theft.

In summary, it may be said that three main reasons were discovered for assault on and excesses towards suspects in police custody. Firstly, it was done in order to obtain information about the whereabouts of the accomplice, if any. Secondly, it was done in order to get information on the whereabouts of stolen property. Thirdly, assault and excesses were designed to induce confessions. In general police assault on and excesses towards suspects were regarded as a cheaper alternative to investigation of crime. The first and second reasons for assault on suspects may be termed "collateral" reasons and they probably explain why there was a discrepancy between the rate of "confessions" made to the police and the plea of guilty in this study. Whilst each of

the 100 interviewed offenders made a statement or a "confession" to the police, chapter 6 will show that only 55% pleaded guilty at their trial. In other words, interrogation (and or assault) on defendants was not always designed to induce confessions, but in some cases it was used as a technique for making defendants name accomplices and reveal the whereabouts of stolen property. Interestingly, only 5 or 9% of the 55 defendants (or of the 55%) who pleaded guilty denied in the interview that they committed the offence. When they were asked why they pleaded guilty, they said that they found little point in pleading not guilty after they had already admitted the offence to the police. It seems that fewer offenders than one would expect claimed to have been wrongly convicted as a result of a forced confession.

In other cases, defendants could have been assaulted because they were "disrespectful" to the police officers during interrogation. Elsewhere, studies have shown that the police frequently use physical force against the "wise guy" who thinks he knows more⁶³ than them and who talks back or insults them.

In a sense, the nature of interrogation found in this study⁶⁴ reveals that it was of an "inquisitorial" nature. The rights of defendants as they exist under the Judges Rules were generally ignored. As seen in chapter 2, proceedings under customary criminal law were of an inquisitorial nature. In traditional society, resources between the defendant and the complainant were in most cases equal and the inquisitorial system was probably suitable under those circumstances. Under the present circumstances, the inquisitorial system, particularly in view of

the many imperfections of the criminal process, on the one hand and the weak position of the defendant vis-a-vis the prosecution on the other, cannot be justified.

Police assault on suspects is hard to document. Consequently, comparative material is not readily available. But one study conducted at Brighton Police Station in England in 1983 by Walkely may be mentioned. Of the 100 detectives who were interviewed, 32% said they were prepared to use physical force as part of interrogation technique, 34% said they could threaten the use of force and 34% said that they could neither use nor threaten the use of force during interrogation. In other words, 64% of the detectives stated that they could use physical force⁶⁵ or threaten use of it during interrogation.

4:6 The Decision to Prosecute: Factors Influencing the Decision

As already seen in chapter 2, there is no separation of responsibility between investigation of crime and its prosecution in Zambia. In other words both the investigation and⁶⁶ prosecution of crime are performed by the police. The police investigate the offence, collect the evidence and decide to⁶⁷ prosecute (or not to prosecute) and finally, prosecute.

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There is no established prosecution policy in Zambia. In individual cases the decision to prosecute is in the descretion of the arresting officer and the prosecutor. In serious cases, however, such as aggravated robbery, the office of the Director of Public Prosecutions (D.P.P) must be involved. In those cases the D.P.P decides to prosecute and handles the prosecution. In

cases where legal issues of particular difficulty arise, the police do seek advice from the office of the D.P.P. who may recommend the amendment of a charge or further investigation of crime, although in practice, there is little cooperation between them (chapter 2).

According to the head of the police prosecution branch at the Force Headquarters, the decision to prosecute in the case of property offences is influenced by 4 factors. These factors are: the value of the property involved (or stolen), the attitude of the suspect, credibility of available evidence and the attitude of the complainant. We briefly examine each of these factors.

4:6(a) The Value of Property Stolen.

Offenders stealing high valued goods such as stock and motor-vehicles are always prosecuted. This satisfies the victim and serves as a deterrent to would be offenders. In addition, the fact that Parliament has provided minimum prison sentences for those offences means that as far as possible all offenders must be prosecuted. On the other hand, offenders stealing less expensive property such as old clothing may simply be cautioned and set free. That is particularly the case where the property has been recovered.

4:6(b) The Attitude of the Suspect.

If the suspect is remorseful and apologetic and, if in addition, the property involved is of small value and it has also been recovered, he may not be prosecuted. Instead, he may be cautioned and possibly slapped and set free. This is done at the Police

Station or on the spot by the police officer concerned. Juvenile suspects are often dealt with by this method.

4:6(c) Credibility of Available Evidence.

There must always be sufficient evidence to secure a conviction or at least to establish a ⁶⁹prima facie case. In the case of burglary, for example, credible evidence which would establish a prima facie case may be the entry into a dwelling house as well as stolen items if any, identified by the owner or the victim. Credible evidence may also include facts linking the suspect to the offence such as the identification of the suspect by the victim or by finger prints. In addition to that evidence, the suspect himself may have provided more valuable information ⁷⁰during interrogation.

4:6(d) The Attitude of the Complainant (or the Victim)

In some cases, the complainant plays an important role in the process of making a decision to prosecute. We will see later in this chapter, that the complainant plays another important role in the withdrawal of cases before the courts. At the time of making a decision to prosecute, the complainant may insist on having his property back if it has been recovered. He then tells the police that he will not be available as a prosecution witness, because he is going away or he is not just interested in prosecution. Deprived of both the exhibit and the material evidence from the complainant the police cannot prosecute the matter. If the offence is of a minor nature such as theft, the police do not usually raise objections to the wishes of the complainant.

On the other hand, the complainant may fully cooperate and indicate his willingness to appear as a prosecution witness. In that case, the matter is prosecuted. In serious cases such as robbery and aggravated robbery, the police do not always follow the wishes of the complainant and drop the matter. The public interest in seeing that serious property offenders are punished overrides the private interest of the complainant. The police may insist on prosecuting the matter and the complainant is persuaded or compelled to cooperate as a prosecution witness.

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It must be mentioned that the police exercise considerable amount of discretion in making the decision to prosecute. Hence, factors such as age, previous convictions or the lack of them and the degree of participation in the commission of the offence are all taken into account.

There is, however, a major loophole in the prosecution practice. It was found in this study that almost invariably, receivers of stolen property were not prosecuted. Instead, they were summoned to court as state witnesses at the trial of the actual perpetrator of the crime. The offence of receiving stolen property is a serious one and it is for this reason that it carries a maximum penalty of 7 years imprisonment, higher than the 5 year maximum sentence for theft. The implication is that receivers of stolen property should be prosecuted as a matter of public interest.

4:7 Conclusion.

This study has shown that members of the public play a

significant role in the shaping the events leading the arrest of suspects. The major source of information upon which the police based their decision to arrest was the victims themselves or other witnesses. In many of those cases, the offence involved was theft by servants or by public servants and in which case the suspect was already known to the victim. As will be seen in chapter 8 (Table 39), theft by servants and by public servants has the highest clear-up rate.

Another source of information leading to arrest of suspects was the interrogation of the alleged accomplice or accomplices. The police reliance on this source has implications on their ability to investigate offences independently. In other words, there seems to be a link between the lack of investigation of offences and the police reliance on interrogation for information. Later in this thesis, we shall see how the police lack of resources has hampered their ability to perform their prosecution functions as well as their ability to prevent crime (chapters 5 and 8).

Like other police forces world-wide, the role of Zambian police in Lusaka, in the events leading to arrest of suspects is a reactive one. In the few cases in which the police played a significant role in the events, the arrest did not result from the investigation of the reported offence, but from a chance encounter with the suspect during routine police work.

Both the Constitution of Zambia and the C.P.C. guarantee the right to bail. The way this question is being handled both by the police and the courts is, however, unsatisfactory. They both

proceed on the assumption that once the defendant is granted bail, he will not be available for his trial. But this assumption goes unchallenged by the defendants, most of whom are unrepresented. The current practice in which the grant or refusal of bail depends on the suitability of sureties other than that of the defendant himself is equally unsatisfactory. It may ignore some strong points in favour of the defendant, such as his ties and responsibilities in the community.

Steps must be taken to enable both the police and the courts to take a more serious view of the question of bail. The right to be informed of the existence of bail should be enshrined in the Constitution. This would give significance to the constitutional right to bail. Consideration should also be given to the possibility of granting bail on offender's own recognizance. Because much of the remand in custody is futile (those remanded in custody are less likely to appear at their trial than those granted bail due to official transport problems), the C.P.C. must provide that the sentence of imprisonment, where it is imposed, must be reduced to the extent of the period spent in custody.⁷² At the moment, magistrates can order that such a sentence be effective from the time of arrest, but at their own discretion.

The availability of space in prison should be considered by the courts when considering bail. It could be worthwhile if magistrates heard evidence on the state of accommodation in Lusaka Central Prison during bail hearings, in view of the overcrowding there, and in view of the fact that most of the remand orders are counter-productive.

Factors which are taken into account in making the decision to prosecute have been examined. It has been shown that the attitude of the complainant is a weighty consideration. Thus even in cases where evidence against the defendant is overwhelming, and the property stolen is of exceptional value, the matter may not be prosecuted if the complainant does not pledge his support for the prosecution. This tremendous power of the complainant to determine the course of the criminal process has never been acknowledged in the past. The view that the decision to prosecute lies within the discretion of the prosecution is largely a myth in Lusaka.

The factors responsible for the influential role of the complainant in the criminal process are not clear. What is certain is that it is not the result of a deliberate policy on the part of the state. But as seen in chapter 2, the victim of crime played a major role in the criminal process under customary law. He was a key witness and he had the power to seek a stay of execution of sentence by appealing to the chief on behalf of the defendant. It may be said that the dominant role of the complainant in the criminal process today is an adaptation of the system to the needs of consumers. It has also been encouraged by the inability of the police to rely on their own resources to investigate and assemble the prosecution case. Later in this thesis, we shall see more evidence of the dominant role played by the complainant in the trial process (chapter 5).

The extent to which the complainant plays a similar role in other jurisdictions is not clear. The view expressed by the Chief

Justice of The Gambia, however, suggests that the complainant in that country does not exert the same amount of influence on the decision to prosecute as does his Zambian counterpart. He said:

"...there does not appear to be any compelling reason why complainants and aggrieved parties and even public interestgroups should not have a right to access to opinions given for or against the institution of prosecutions...".73.

The exact details of the nature of police-suspect encounter is difficult to ascertain, mainly due to the fact that police practices in both Lusaka and the whole country are not subjected to any real public scrutiny and accountability. The fact that access to legal advice during police detention and questioning is severely limited makes this aspect of police work the most unexplored. Nevertheless, evidence from offenders, police officer and legal practitioners suggests that the police-suspect encounter in Lusaka is often characterised by the assault and even "torture" of suspects. This problem raises the important question about the balance between police powers and practices and the safeguards against abuse of those powers. The balance is necessary in order to protect civil liberties as well as to ensure accountability in law enforcement. In some countries, particularly in the United States and in England and Wales, legislation and case law regulating the police-suspect encounter seek to strike the balance in question.

In the United States, police interrogation is governed by the 5th Amendment to the Constitution which guarantees the right against self incrimination (or the right to silence) and by the 6th Amendment which guarantees the right of the accused person to

counsel. One of land-mark cases interpreting the two amendments⁷⁴ is Miranda V Arizona, decided in 1966. It was held in that case that the right to have counsel present during in-custody interrogation was indispensable to the protection of the 5th Amendment. It was also held that the right to counsel required the State to appoint counsel if the defendant was indigent. Interrogation should stop or cannot start if the defendant says he wants the presence of counsel.

As a result of this strict adherence to the Constitutional Amendments, the police in the United states, it is claimed, are less inclined to use brutal methods of interrogation. The suspect has a right to call a halt to the interrogation by requesting for the presence of counsel. If interrogation continues without counsel (in the absence of a waiver) nothing obtained from the suspect⁷⁵ will be admissible in evidence.

In England and Wales, prior to 1984, interrogation of suspects was solely regulated by Judges Rules and Administrative Directions. In 1984, following the enactment of The Police and Criminal Evidence Act, interrogation is now governed by Codes of Practice formulated under that Act. Unlike the Judges Rules, the Codes of Practice require the caution to be administered at the beginning of interrogation. Besides, unlike the Judges Rules, breach of Codes of Practice results in proceedings which may end⁷⁶ in the dismissal of police officers concerned.

For the purpose of this discussion, the most important Code of Practice is Code C, which regulates the treatment and questioning

of persons by police officers. In order to ensure adequate protection of the rights of detained persons, Code C ensures that their welfare and their interrogation are handled by different police officers. Thus that Code provides for the appointment of a custody officer at each Police Station throughout the country, whose duty is to ensure that the rights of the detainees are brought to their attention and that those rights are enforced. One of the important rights that the custody officer should bring to the attention of the detainee is the right to legal advice during interrogation either at his own expense or at the expense of the State.⁷⁷

As already indicated above, the custody officer does not take part in the interrogation of suspects. His role here is to pass the suspect into the hands of an interviewing officer. At the end of the interrogation, the interviewing officer hands the suspect back to the custody officer with an account of how he treated the suspect during the period of interrogation.⁷⁸ Before interrogation begins, the interviewing officer should remind the suspect of his right to counsel. Interrogation may proceed without legal advice if the suspect feels that he does not need it. Interrogation, however, cannot proceed if a request for a solicitor is made,⁷⁹ until one is found. It has been held that failure to inform the defendant of his right to legal advice before interrogation begins renders the proceedings of the interrogation inadmissible⁸⁰ in evidence.

Questioning of suspects outside the Police Station has been abolished generally in England and Wales because of the

difficulties that may arise if the defendant wishes to exercise his right to a solicitor. Questioning outside the Police Station, however, may be conducted in exceptional circumstances, such as in cases where delay may hinder the recovery of property suspected to have been stolen.

As a further precaution against police excesses during interrogation of defendants, the policy of the Government in England and Wales is to ensure that all interviews at Police Stations are tape recorded. At the moment, video recording of interviews is being experimented in West Midlands, West Yorkshire
81
and at Edmonton in North London.

How can the balance between police powers and practices on the one hand and safe-guards against their abuse on the other be maintained in Lusaka and indeed throughout the whole country?. In other words how can we ensure that powers of the police are checked but without at the same time tying their hands in law enforcement?. As seen earlier in this chapter the police have adequate powers but what is lacking is the mechanism for checking their abuse.

Access of defendants to legal advice during interrogation enhances procedural fairness. It has been reported in England for instance, that the involvement of lawyers in the questioning process has brought about police compliance with the Codes of
82
Practice. In Lusaka as well as in the whole country, there are no resources to ensure that every suspect has legal advice during or before interrogation. Due to poor incentives and conditions

of service, the Legal Aid Department has always been terribly understaffed.⁸³ As already seen in chapter 3, most offenders are too poor to afford private legal advice. Besides, the wide-spread availability of legal advice to suspects would be met with strong opposition from police officers which could make the rule difficult to enforce. At the moment, the practice at most Police Stations is to refuse suspects access to lawyers before they⁸⁴ are questioned because "lawyers interfere with investigations".

Similarly, the country cannot afford the wide-spread use of tape or video recording of all interrogations. Other than the question of cost that is involved, recording of interviews could inhibit suspects from talking as most of them would be unwilling to have⁸⁵ their voices recorded. In that case this approach could only induce further torture of suspects in order to make them submit to recording. Even though the presence of a video camera or a tape recorder may deter the police from using physical force against suspects, the recording could easily be tampered with,⁸⁶ as has been pointed out in England, for example.

Another possible approach could be to curtail the right to silence as is the case in Singapore and in Northern Ireland. This could be done in the hope that if suspects knew of the consequences of maintaining silence (i.e the court making inferences), they could be compelled to speak to the police, thus sparing them of physical abuse during prolonged interrogation. But as seen in this chapter, most defendants do not exercise the right to silence during police interrogation. Besides, in both Singapore and Northern Ireland, the curtailment of the right to

silence has not resulted in more suspects talking to the police than was the case before. Rather, the curtailment of the right to silence in both countries has only enabled the judge or the jury to make inferences on the defendant's silence more openly.⁸⁷ In addition, the existence of the right to silence, though infrequently invoked, stands as a symbol or declaration of what society feels about self incrimination. Its abolition or curtailment could significantly worsen the position of the defendant vis-a-vis the police which is already precarious.

.....

Yet another means by which the balance in question could be maintained would be through the "presumption of inadmissibility" of confession in all trials. In other words, the law could provide that all confessions would be inadmissible unless they were proved to have been voluntary. On the face of it, this could be significant because in practice, the distinction between voluntary and involuntary confessions is blurred. All confessions are apparently deemed "voluntary".

The problem with this approach, however, would be that it could prevent or delay the punishment of those defendants who voluntarily confessed. In addition, hearing on the rebuttal of the presumption of inadmissibility of every confession could considerably delay the court proceedings and flood the courts with cases.

The underlying reason for police excesses towards suspects lies in the gulf that exists between the police and the public. The gulf itself results from the fact that the entire police force

has never undergone any major transformation since independence, so as to prepare it for the challenges of the post-colonial order. Its training and control are still tailored towards the needs of the pre-independence order. On the other hand, the lack of resources has hampered police functions, such as the investigation of crime. All this has called into question the legitimacy of the police force.

It is suggested that the remedy to police excesses lies in the harmonization of police-public relations. This in turn calls for appropriate recruitment procedures and training as well as a sound system of police accountability. In another section of this thesis, we shall see how the question of police reform could be tackled (chapter 9)

Notes

1 Section 2 of the Criminal Procedure Code (C.P.C.) Cap 160 of the Laws of Zambia, defines a "cognizable offence" as an offence for which a police officer may arrest in accordance with the First Schedule (to the C.P.C.) or under any written law for the time being in force, arrest without a warrant.

2 Section 27(c) of the C.P.C.

3 Sections 30 and 33 of the C.P.C. The two sections ,however, do not define "offences of serious nature."

4 It seems that a person who commits a non-cognizable offence may be arrested without a warrant if upon being requested, he refuses to give his name and address or the police officer is of the view that the name and address given are false. The purpose of arrest in this instance is to enable the police officer to ascertain the name and address given. The police officer is expected to release the suspect on police bond once that has been done. See section 29 of the C.P.C.

5 Section 31 of the C.P.C. and sections 51 and 52 of the Zambia Police Amendment Act, Number 23 of 1985.

6 Section 31 of the C.P.C.

7 Section 32 of the C.P.C. There is also a general power of arrest entrusted to both the police and private persons. It relates to the arrest of persons escaping from lawful custody and no warrant is required. See sections 37 and 38 of the C.P.C.

8 In practice, magistrates do not exercise this right.

9 Section 39 of the C.P.C. states:

"Every person is bound to assist a magistrate or a police officer reasonably demanding his aid:

(a) in the taking or preventing the escape of any other person whom such magistrate or police officer is authorised to arrest.

(b) in the prevention or suppression of a breach of the peace or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property."

10 See for instance, Rice v Connolly [1966] 2 QBD 414 in which it was held that "...the sole question is whether the defendant had a lawful excuse for refusing to answer the questions put to him. In my judgment he had. It seems to me quite clear that though every citizen has a moral duty or if you like a social duty to assist the police, there is no legal duty to that effect and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority and to refuse to accompany those in authority to any particular place, short of course, of arrest". Per Lord Parker, LCJ. This principle has been adopted in Zambia.

11 See J.Baldwin and R.Leng, "Police Powers and the Citizen", The Howard Journal, Vol. 23 No. 2 June, 1984, 92-93.

12 A.J. Reiss and D.J.Bordua, "Environment and Organization: A Perspective on the Police" in D.J.Bordua, (ed) The Police: Six Sociological Essays, New York, 1967, 25. See also M.McConville and J Baldwin, Courts, Prosecution and Conviction., Oxford, 1977, 145, and D.Walsh and A.Poole, op cit, 165-167.

13 A.K Bottomley and C.Coleman, "Criminal Statistics: The Police Role in the Discovery and Detection of Crime" 4 International Journal of Criminology and Penology, 1976, 33-58. In the same year, i.e 1976, Chatterton found that almost half of all arrests (49%) for crime were cases in which the public had provided the police with a prisoner. Police initiated arrests accounted for 37%. See M.Chatterton, "Police in Social Control" in J.Baldwin and A.Keith Bottomley (eds), op cit, 46.

14 P. Softley, Police Interrogation: An Observational Study in Four Police Stations. Home Office Study Number 61, 1980.

15 M.McConville and J.Baldwin, "The Role of Interrogation in Crime Discovery and Conviction" 22 Brit.Jo.Crim. 1982, 165-175. and their Courts Prosecution and Conviction. op cit, 148-153. See also D. Steer, Uncovering Crime: The Police Role R.C.C.P. Research Study Number 17, 1980. For American research, see for example, D.Black, Manners and Customs of the Police New York, 1980.

16 B.Mitchell, "The Role of the Public in Criminal Detection", [1984] Crim.L.R. 459, 461 (Table 1). See also M.Zander, "The Investigation of Crime: A Study of the Cases Tried at the Old Bailey", [1979] Crim.R.L. 203, in which he reported that in 78% of the cases, the police were activated by information supplied by victims and ordinary members of the public, 205.

17 Interview with Detective Chief Inspector E.Mashabe, on 16th. November, 1989.

18 Bwalya, (Theft from a motor-vehicle) interviewed on 6th.October, 1989. See also Hachikwila, (Theft of a motor-vehicle) interviewed on 9th. August, 1989. Mulenga, (Burglary) interviewed on 11th. September, 1989.

19 Estimates of the percentage of arrests resulting from information supplied by members of the public at each Police Station visited were as follows: Matero, 75%; Kabwata, 80%; Chelstone, 90%; Lusaka Central 85%.

20 Cases in which the employee himself identified the offender were particularly those in which after the offence had been committed, the offender behaved in a rather suspicious manner, such as for instance, staying away from work. See for example, Lupiya, (Theft by servants) interviewed on 6th September, 1989. Daka, (Theft by servants) interviewed on 12th August 1989. In other cases, offenders were identified as guards made their

routine checks on all workers walking out of the premises. See for example Sindaza, (Theft by servants) interviewed on 19th October, 1989.

21 See, for instance Moyo, (Theft) interviewed on 4th. October, 1989. Matipa, (Theft) interviewed on 27th August, 1989. Yeyenga, (Theft) interviewed on 13th October, 1989.

22 See, for instance, Matiba, (Theft) interviewed on 9th. August, 1989; Mondanya, (Theft) interviewed on 29th. September, 1989.

23 Phiri, (Robbery) interviewed on 14th. August, 1989; Chipanta, (Aggravated Robbery) interviewed on 15th. September, 1989.

24 Mwanza, (Burglary) interviewed on 12th. October, 1989; Banda, (Burglary) interviewed on 10th. October, 1989; A.Phiri, (Burglary) interviewed on 25th. September, 1989.

25 McConville and Baldwin found that 7.6% of the offenders were arrested as a result of information provided through interrogation of the alleged accomplices, see op cit., 1982, 186. One American study found that 12% of the arrests were a result of information provided by the accomplice, see M. Wadel, R. Ayres, D.W Hess, M Schantz and T.H Whitebread, "Interrogation in New Haven: The Impact of Miranda" 76 Yale Law Journal, (1967) 1519-1648.

26 It was seen in Chapter 3 that whilst only 40% of theft offenders committed offences in groups, 83% and 90% of burglary /house breaking offenders and robbery offenders respectively committed offences in groups.

27 Banda, (House Breaking) interviewed on 28th. September, 1989.

28 Ndabalilendo, (Theft) interviewed on 28th. September, 1989.

29 See for instance, Sikazwe, (Burglary) interviewed on 10th. September, 1989.

30 Ngoma, (Burglary) interviewed on 23rd. September, 1989.

31 See section 49 of The Zambia Police Amendment Act Number 23 of 1985.

32 Mbao, (Burglary) interviewed on 4th. October 1989.

33 R.Reiner, The Politics of the Police, London, 1984, 111.

34 Section 123 of the C.P.C.

35 Sections 127 and 127-133 of the C.P.C.

36 In Ibadan, Nigeria, the likelihood that the defendant would interfere with investigations is usually considered where "there

is evidence of a previous attempt to interfere, or where the accused person is a member of a widespread criminal organization or conspiracy or where the offender is so influential or so powerful that his presence in the community will inhibit witnesses coming forward to cooperate in the police investigation or the likelihood of the offender committing other offences". See A.A.Ayedemi, "The Place of Bail in Our Criminal Process", in A.A.Ayedemi, (ed) Nigerian Criminal Process, Lagos, 1977, 242.

37 See A.Keith Bottomley, Decisions in the Criminal Process, London, 1973, 8.

38 Ibid, 90.

39 See the Prisons Department Annual Reports, 1986, 6 and 11.

40 See the Prisons Department Annual Reports, 1980, 6 and 1986, 7.

41 Clegg et al, found that only 4% of those allowed bail in Lusaka and Kitwe failed to turn up for trial, op cit. On the other hand, an earlier study coordinated by the writer found that 38% of the offenders remanded in custody failed to turn up for trial because the police could not provide them with transport. See Report on Police Prosecution in Lusaka, op cit.

42 A.Keith Bottomley, Prisons Before Trial, London, 1970, 37. A Philadelphia study found that 22% of convicted offenders who were on bail were sentenced to imprisonment upon conviction compared to 57% of those who had been remanded in custody before trial. A New York study found that 45% of those convicted after being allowed bail were imprisoned compared to 84% who were remanded in custody. In Toronto, a study there found that only 15% of indictable offenders on bail were sentenced to imprisonment compared to 61% of those in custody during the trial. See A.Keith Bottomley, op cit, 1973, 91.

43 A study in Nigeria found that only 21.7% of those remanded in custody received prison sentences eventually. See A.A.Ayedemi, "Sentence of Imprisonment: Objections, Trends and Efficacy", in A.A.Ayedemi, (ed) op cit, 317. A Milner found that less than 30% of those remanded in custody received prison sentences eventually. See op cit, 1972, 223.

44 An Ibadan study found that in the 10.12% of the cases in which bail was refused, the refusal was based on the seriousness of the offence (eg burglary), and the severity of the punishment. See Ayedemi, op cit, 245.

45 A Keith Bottomley, op cit, 1970, 33.

46 By the provisions of English Law (Extent of Application) Act, Cap 4 of the Laws of Zambia seen in chapter 1.

47 See K.Greenawalt, "Perspectives to the Right to Silence" in

J.Baldwin and A.Keith Bottomley, op cit, 55.

48 See M.Ndulo, "Confessions-Tainted Evidence?" 5 Zambia Law Journal (1973) 101; Zambia uses the pre-1964 Judges Rules.

49 Judges Rules, Rules 1,2 and 3.

50 One English study found that 174 out of 204 suspects were not cautioned at the time of arrest but were cautioned at the time of questioning, 27 were not cautioned on any occasion apart from the "formalities of charging"., see P.Softley op cit, 26.

51 K.M.M.Likando, op cit, 54.

52 Chimbulu, (theft of a motor-vehicle), interviewed on 18th. August, 1989. The time spent on the Kampelu depended on how much pain the defendant was able to endure. Many offenders confessed within 15 minutes and were released. Kampelu is a Bemba word which means a see-saw or a swing.

53 Police officers informed the writer that people suspected of having committed such offences as theft by servants "cooperated" early in the interrogation process. The problem was with those suspected of having committed burglary and robbery. Some of them would have been interrogated before, they knew the procedures at the Police Station and were not frightened. They usually lied and shifted the blame on somebody else. They would give false names of their accomplices or of buyers of stolen property. These suspects often became subjects of Kampelu in turn. Interviews with Detective Chief Inspector E.Mashabe, Matero Police Station, 15th. November, 1989 and Chief Inspector G.J.E.Kapembwa, Kabwata Police Stations, 16th. November, 1989.

54 Research evidence elsewhere suggests that suspects rarely exercise the right to silence during police interrogation. In England, for example, Softley found that only 12% of the suspects exercised that right, op cit, 28-29. See also McConville and Baldwin, op cit 1977, 89.

55 Greenawalt, had earlier made a similar finding in England, op cit, 53-63. See also Rice V Connolly, op cit, in which James LJ. observed obiter, "I would not go as far as to say that there may not be circumstances in which the manner of a person together with his silence could not amount to an obstruction within the meaning of the section....". It would therefore appear that the police do sometimes regard silence on the part of the defendant as behaviour amounting to an "obstruction of the police in the course of duty".

56 Interview with Chief Inspector G.J.E. Kapembwa, Kabwata Police Station, 15th November, 1989.

57 Ibid

58 The view expressed by Mr.L.S.Mwaba (deceased) the Chief

Parliamentary Draftsman, Attorney-General's Chambers, Lusaka. Zambia has adopted the English position whereby the judge has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper means. English courts like the Zambian courts are not concerned with how evidence was obtained, see the English case of R v Sang [1979] 2 All ER 1222 at 1231. The trial judge, however, has discretion to exclude that evidence if its admissibility would be "unfair" to the defendant. The American position seems to be different. Illegally obtained evidence is excluded in Federal Courts on the ground that allowing such evidence would encourage unconstitutional governmental activity, see for example, Verdugo v United States (1968 CA 9, Cal) 402 F2d. 599.

59 Electric shocks have also been used on some offenders, see for instance, Chimba v Attorney General, High Court Judgement Numbers HP 1154, 1155, 1157, 1159 of 1972. Information on the training of investigators is not readily available. According to the Zambia Police Annual Report of 1985, (the only Report with this information) between February and April 1985, a total of 24 police officers underwent a crime intelligence and investigation course at Lilayi Training School. See the Zambia Police Annual Report 1985, 6.

In other countries, the police use a variety of psychological pressures rather than physical force to obtain evidence. In England, for example, see Softley, op cit, 33.

60 For instance the following are some of the police officers on record as having been shot dead on duty by armed robbers: Sub-inspectors Chile (1981), Phiri (1979), Chishimba (1978); Constables Simbao (1979), Katongo (1980), Mwanza (1980), Makumbi (1983). Civilians who have been killed by armed robbers in the course of robberies include two Members of Parliament the late Hon. Inyambo and the Hon. Matanda.

61 R.Reiner, The Blue-Coated Worker, Cambridge, 1978, 79.

62 The view expressed Mr. L.S.Mwaba (foot note 58). Such allegations were made in the case of Phiri, 2P-282(1986), discussed in chapter 7 under the Suspended Sentence.

63 See W.A.Westley, Violence and the Police, Cambridge, (Mass), 1970, 126.

64 "Inquisitorial" nature of interrogation is defined as an interview in which the interviewer is unsure of the suspect's guilty and he seeks information from him both verbal and non-verbal which would help the interviewer arrive at the truth. "Persuasive" nature of interrogation is where the interviewer uses persuasive tactics to over-come the offender's unwillingness to answer questions. In this case, the interrogator "feels his way around" until he arrives at the truth. See J.Brian Morgan, The Police Functions and the Investigation of Crime, Aldershot, 1990, 94-95.

65 Ibid, 98. That study, however, is of little value because responses from detectives were based on hypothetical cases rather than real situations.

66 Police prosecution is confined to the Subordinate Courts. In both the High Court and the Supreme Court only State Advocates can prosecute.

67 In other countries investigation and prosecution are preformed by different groups of people. In England for example, since 1984, the police investigate, collect evidence and decide to peosecute, but they do not prosecute. Instead, they pass the matter to the Crown Prosecution Service who decide whether the charges should proceed, be amended or dropped altogether, see R.C.A. White, The Administration of Justice, Oxford, 1985, 43.

68 This is the view expressed by a former D.P.P. and by the current head of the police prosecution branch. But even though the existence of prosecution policy was denied, the D.P.P is expected to consult the Attorney-General on matters of "public policy" and the views of the latter are final. See Article 56(6) of the Constitution of Zambia.

69 A prima facie case is defined as "a case in which there is sufficient evidence which if uncontradicted would justify a reasonable jury in convicting the defendant" see McConville and Baldwin, op cit, 1977, 135. In the Zambian context, a prima facie case may be defined as" a case in which there is sufficient evidence which if uncontradicted would enable the magistrate or the judge to find the accused person with a case to answer and then put him on his defence". In other counties, it would appear that the existence of a prima facie case alone is not sufficient to warrant prosecution. In England and Wales for example, the Assistant D.P.P. once said: "First of all we ensure that there are no insuperable and fatal defects in the case.....Next, if we are satisfied that ther is no fatal blow in the case, we go on to consider not so much whether there is a prima facie case, but whether or not there appears to be a reasonable prospect of a conviction...We (then) have to consider whether in its widest sense, is it in the public interest to institute proceedings?" P. Barnes, "Office of the D.P.P." in The Prosecutor, Institute of Judicial Administration, University of Birmingham, Monograph 1975, 22-37. See also R.C.A. White, op cit, 41

70 An American writer terms this as "legal sufficiency" policy of prosecution in which the decision to prosecute is taken as long as all the elements of the crime are present, see J.E Jacobyn "The Changing Policies of Prosecution" in W.F.McDonald (ed), The Prosecutor, London, 1979, 82-86.

71 See L.L.Weinreb, op cit, 614.

72 In England and Wales, this is provided under section 67 of the Criminal Justice Act, 1967.

73 The Hon. Mr. Justice E.Olanyika Ayoola, Chief Justice of the

Gambia, "The Decision to Prosecute", Key note address delivered on 20th. March, 1991 at the First Conference of Commonwealth Africa Directors of Public Prosecutions, held in Banjul, The Gambia, Commonwealth Law Bulletin, Vol. 17 No. 3 July, 1991 1032, 1036.

74 384 US 436, 86. S.ct. 1602, 16 L.Ed. 2d 694 (1966). See also, Escobedo V Illinois, 378 US, 478. Sct. 1758, 12 L.Ed. 2d 977 (1964), Edwards V Arizona, 451 US 477 (1981).

75 See W.J.Stuntz, "The American Exclusionary Rule and Defendant's Changing Rights" [1989] Crim.L.R. 117, 125.

76 J.Brian Morgan, op cit, 109. Judges Rules did not provide adequate protection to suspects. One of their weaknesses was that they lacked the means to stop the police from overcoming the suspect's reluctance to speak. See also A.S.A.Suckerman, "Trial By Unfair Means- The Report of the Working Group on the Right to Silence". [1989] Crim.L.R. 855, 858. Another short-coming of the Judges Rules was that it was inconceivable that the police who enjoyed the power to question any person for the purpose of discovering perpetrators of crime, could have been expected at the same time to inform the defendant that he did not have to answer their questions. See S.H.Bailey, D.J.Harris and B.L.Jones, Civil Liberties, Cases and Materials, London, 1980, 111.

77 D.Wolchover and A.Heaton-Armstrong, "The Questioning Code Revamped" [1991] Crim.L.R. 232, 235.

78 See sections 39(2) and 39(3) of The Police and Criminal Evidence Act, 1984 (England and Wales).

79 D.Wolchover and A.Heaton-Armstrong, op cit, 248.

80 R.V.Williams (Violet), [1989] Crim.L.R., 60 and R.V.Samuels [1988] 2 All E.R 135, 144.

81 D.Wolchover and A.Heaton-Armstrong, op cit, 249.

82 A.S.A.Suckerman, op cit, 857.

83 Several vacancies for Legal Aid Counsel remain unfilled every year at the Ministry of Legal Affairs. See for instance, Department of Legal affairs Annual Report, 1985, 4, 12.

84 At Kabwata Police Station for instance, the Chief Inspector informed the writer that: "We do not allow lawyers to be present during interviews because they interfere. Lawyers are primarily interested in getting their clients out of trouble. They do not appreciate our problems". Interviewed on 15th November 1989.

85 At the beginning of every interview in this study, every offender was asked if they minded the interview being tape recorded. The first 50 to be interviewed said they would. The

initial plan of tape recording some interviews therefore had to be abandoned altogether.

86 See H.Bailey et al, op cit, 112.

87 See Meng Heong Yeo, "Diminishing the Right to Silence: The Singapore Experience" [1983] Crim.L.R., 89 and the case of Haw Tua Tau (Singapore) [1981] 3 All E.R 14, where it was observed that: "The law has always recognised the right of deciders of fact in a criminal trial to draw inferences from the failure of a defendant to exercise his right to give evidence thereby submit himself to cross-examination. It would in any case be hopeless to expect jurors or judges as reasonable men to refrain from doing so", 20.

The curtailment of the right to silence in Singapore has meant that judges can now openly and legally draw inferences on the defendant's silence.

As for Northern Ireland, see J.D.Jackson, "Curtailling the Right of Silence: Lessons from Northern Ireland" [1991] Crim.L.R 404.

TABLE 17 THE ROLE OF THE POLICE AND THE CONSUMERS OF CRIMINAL JUSTICE IN THE ARREST OF THE 100 INTERVIEWED OFFENDERS

MODE OF ARREST	Theft by Servants and by Public Servants	Theft	House Breaking	Burglary	Stock and Motor Vehicle Theft	Robbery and Aggravated Robbery	Total
Police caught offender in the act.	-	-	-	-	-	-	0
Police caught offenders in possession of property reported stolen or suspected of being stolen.	-	1	2	-	2	-	5 (5%)
Police caught offender after a tip-off from members of the public/consumers of criminal justice.	-	-	-	-	-	3	3 (3%)
Offender identified through interrogation of alleged accomplice.	1	2	5	10	4	3	25 (25%)
Victim or other witness caught offender in the act.	1	4	-	1	1	-	7 (7%)
Victim or other witness named or otherwise identified offender.	31	8	3	5	3	3	53 (53%)
Offender apprehended by vigilantes.	-	2	-	4	-	1	7 (7%)
TOTAL	33	17	10	20	10	10	100 (100%)

TABLE 18 BAIL AND REMAND AGAINST JUDGMENT (ALL DEFENDANTS IN THE SAMPLE (Case Records).

		Bail		1		2		ALL	%
		0	NO	%		No	%		
		-----	-----	-----		-----	-----		
J	1	1	94	17.5	443	82.5	538	100.0	
u	2	0	45	38.5	72	61.5	117	100.0	
d	3	0	164	35.9	293	64.1	457	100.0	
g	4	0	8	47.0	9	53.0	17	100.0	
m	ALL	1	311	27.5	817	72.5	1129	100.0	
e									
n									
t									

Key:

<u>Judgment</u>	
Convicted.....	1
Acquitted.....	2
Withdrawn.....	3
Dismissed.....	4

<u>Bail</u>	
Not Stated on the Case Record.....	0
Allowed Bail.....	1
Refused Bail/ Remanded in Custody.....	2

TABLE 19 BAIL AND REMAND AGAINST SENTENCE (Case Records).

		Bail		1		2			
		0	NO	%	No	%	ALL		
								
e	1	1	66	18.6	287	81.4	354	100.0	
n	2	0	11	14.9	63	85.1	74	100.0	
t	3	0	2	15.4	11	84.6	13	100.0	
e	4	0	4	23.5	13	76.5	17	100.0	
n	5	0	9	13.8	56	86.2	65	100.0	
c	6	0	2	18.2	9	81.8	11	100.0	
e	7	0	0	100.0	1	0.0	1	100.0	
	8	0	0	100.0	3	0.0	3	100.0	
ALL		1	94	17.5	443	85.2	538	100.0	

<u>Key:</u>	
<u>Sentence</u>	
Imprisonment.....	1
Suspended Sentence.....	2
Probation.....	3
One Day's Imprisonment Plus a Fine.....	4
Caning.....	5
Discharge.....	6
Fine.....	7
Extra Mural Penal Employment.....	8

<u>Bail.</u>	
Not Stated on the Case Record.....	0
Allowed Bail.....	1
Refused Bail/ Remanded in Custody.....	2

TABLE 20 BAIL AND REMAND AGAINST CHARGE AMONG THE IMPRISONED OFFENDERS (Case Records).

		No		%	No		%		
Bail		0		1	2		ALL		
		-----	-----	-----	-----	-----			
C	0	0	1	20.0	4	80.0	5	100.0	
h	1	1	5	11.9	36	88.1	42	100.0	
a	2	0	24	22.4	83	77.6	107	100.0	
r	3	0	4	26.7	11	73.3	15	100.0	
g	4	0	2	25.0	6	75.0	8	100.0	
e	5	0	12	29.3	29	70.7	41	100.0	
	6	0	6	7.0	80	93.0	86	100.0	
	7	0	11	24.4	34	75.6	45	100.0	
	8	0	1	20.0	4	80.0	5	100.0	
ALL		1	66	18.6	287	81.4	354	100.0	

Key

Charge

Theft of a Motor-vehicle.....0
Theft From the Person.....1
Theft by Servants.....2
Theft by Public Servants.....3
Stock Theft.....4
Theft from a Motor-vehicle.....5
Burglary.....6
House Breaking.....7
Robbery.....8

Bail

Not Stated on the Case Record.....0
Allowed Bail.....1
Refused Bail/Remanded in Custody.....2

TABLE 21 RELATIONSHIP BETWEEN BAIL/ REMAND AND THE PLEA FOR CONVICTED DEFENDANTS (Case Records).

		Bail		0		1		2		ALL	
				No	%	No	%	No	%		%
P	0	0	0.0	0	0.0	1	100.0	1	100.0		
l	1	0	0.0	15	4.9	293	95.1	308	100.0		
e	2	1	0.4	79	34.5	149	65.1	229	100.0		
a	ALL	1	0.2	94	17.5	443	83.2	538	100.0		

Key:

Plea

Not Stated on the Case Record.....0
Guilty.....1
Not Guilty.....2

Bail

Not Stated on the Case Record.....0
Allowed Bail.....1
Refused Bail/ Remanded in Custody.....2

TABLE 22

POLICE - SUSPECT ENCOUNTER: METHODS USED IN THE INTERROGATION OF THE 100 INTERVIEWED OFFENDERS

METHOD OF INTERROGATION	OFFENCE CATEGORIES						
	Theft by Servants and by Public Servants	Theft	House Breaking	Burglary	Stock and Motor Vehicle Theft	Robbery and Aggravated Robbery	TOTAL
Not assaulted.	15	8	3	1	4	-	31 (31%)
Assaulted (i.e slapped, kicked, beaten with a stick or belt).	15	5	3	9	2	4	38 (38%)
Assaulted and put on <u>Kampelu</u> .	3	4	4	10	4	6	31 (31%)
TOTAL	33	17	10	20	10	10	100 (100%)

CHAPTER 5.

TRIAL PROCESS: THE POLICE, MAGISTRATES' COURTS AND THE CONSUMERS OF CRIMINAL JUSTICE.

5:1 Conduct of the Trial

Criminal proceedings in Zambia are brought in the name of "The People". Proceedings are conducted in English, but the defendant is entitled to speak a language of his choice out of the many Zambian languages. If the defendant chooses to speak a Zambian language, which is usually the case, an interpreter is provided by the court,

In this study, case records of the 1129 defendants revealed that 77% of them chose to speak Nyanja, the most widely spoken language in Lusaka, 14% spoke Bemba, 3% spoke English and another 3% spoke Tonga. The rest of the defendants spoke other languages in the proportion of less than 1% per language.

At the beginning of the trial, the defendant is called by the magistrate to take his place in the dock. Thereafter, the magistrate reads out the charge to him and asks him if he understands the charge. If the defendant says that he does not understand the charge, the magistrate will read out the charge once more and explain it. If the defendant still says that he does not understand the charge, a plea of not guilty will be entered on his behalf. On the other hand, if the defendant says that he understands the charge, he will be asked to plead to the¹ charge.

If the defendant pleads guilty and the prosecutor is ready with the facts of the case, he will be required to read them to the

court immediately. The defendant will then be asked whether the facts as read are correct or whether he wishes to make any amendments to the facts. If he says that the facts as read are not correct, the plea of guilty will be amended to one of not guilty. If, on the other hand, he says that the facts are correct, he will be convicted as charged by his own admission.

After the defendant has been convicted, the prosecutor informs the court whether he is a first offender or whether he has previous convictions, as will be seen further in chapter 6. The court will then ask the defendant if he wishes to say something in mitigation of sentence. What defendants said in mitigation of sentence in this study and how magistrates reacted to it will be discussed later in this thesis (chapter 6). It is not unusual for the court to adjourn a case to another date for mitigation and sentence after the defendant has been convicted. A case may also be adjourned to another date if, following a plea of guilty, the prosecutor is not ready with the facts of the case.

If a plea of not guilty is entered, a trial inevitably follows, though not on the same day. The prosecutor opens the case with a brief statement of the facts which he wishes to prove in the course of the trial. He also mentions the number of witnesses he wishes to call and the exhibits he intends to tender in evidence, if any.

2

Summonses are served on witnesses by police officers. As will be seen later in this chapter, failure by the police to serve summonses on witnesses and the subsequent failure by witnesses

to attend and give evidence in court accounted for the withdrawal of some cases in this study. Witnesses are guided step by step by the prosecutor in the examination-in-chief. During the examination-in-chief, the prosecutor has before him a statement made earlier by the witness.

The prosecutor relies heavily on the evidence of the arresting officer. The latter is in charge of exhibits, if any, and his evidence is crucial to the success of the prosecution. As will be seen later in this chapter, some cases were withdrawn in court in the present study because of the failure by the arresting officer to come and give evidence in court.

At the end of the prosecution's case, the magistrate addresses the defendant for the second time (the first time being at the time of reading the facts of the case and taking the plea). If it appears to the court that a prima facie case has not been established against the defendant, the case is dismissed and the defendant is acquitted. On the other hand, if a prima facie case has been established or if the prosecution has adduced enough evidence against the defendant, the court will find him with a case to answer and put him on his defence.

Once the defendant has been put on his defence, the magistrate takes the following steps:

- (a) Firstly, he explains the charge to the defendant in person in the same way he did at the time of the reading the charge and taking the plea.
- (b) Secondly, he informs the defendant that he has three possible

options open to him and these are:

- (i) he can elect to remain silent or
- (ii) he can elect to give evidence on his own behalf not on oath in which case he cannot be cross-examined or
- (iii) he can elect to give evidence on oath in which case he can be cross-examined.

(c) Thirdly and lastly, the magistrate asks the defendant whether he has any witnesses to call or other evidence to adduce in his defence. He also reminds the defendant of his right to cross-examine prosecution witnesses.³

The defendant cannot be called as a witness for the defence except upon his own application.⁴ At the close of the defence case, the prosecution is called upon to sum up their case. The last person to address the court is the defendant or his counsel, who is called upon to sum up the case for the defence before judgment is passed. If the defendant is found guilty, he is again called upon to say something in mitigation of sentence.

5:2 Withdrawn Cases.

An interesting aspect of the administration of criminal justice in the Zambian magistrates' courts is the large number of cases that are withdrawn before all evidence is heard and judgment is passed. Clegg, Harding and Whetton found that 37.3% of all cases studied (involving all offences under the Penal Code)⁵ were withdrawn under the provisions of the C.P.C. In this study, 321 cases or 37.8% of the 850 cases studied were withdrawn. In terms of individual defendants, it means that 457 defendants or 40.5% of the 1129 defendants whose case records

were studied had their cases withdrawn from the Lusaka magistrates' courts as Table 23 shows. In other countries, much lower withdrawal rates have been reported, partly because of the risk of a civil action against the police for wrongful arrest.⁶ In this section, we discuss the nature of withdrawn cases, the reasons behind the applications for withdrawals and the court's reaction to those applications. The discussion is based on the three different sections of the C.P.C. under which a prosecutor or a complainant can apply to the court to have the case withdrawn.

5:2A Cases Withdrawn under Section 88(a) of the C.P.C and the Reasons for Withdrawal.

Section 88 of the C.P.C. reads as follows:

"In any trial before a Subordinate court any public prosecutor may with the consent of the court or on instruction of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from prosecution of any person and upon such withdrawal:

(a) if it is made before the accused person is called to make his defence, he shall be discharged, but such discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.

(b) if it is made after the accused person is called to make his defence, he shall be acquitted".

All applications to withdraw cases under this section were made under subsection (a), which meant that all the defendants involved were discharged and not acquitted. Of the 457 defendants whose cases were withdrawn, 272 or 59.5% had their cases withdrawn under section 88(a) of the C.P.C. The 272 defendants included 24 juveniles. As Table 23 indicates, all offence categories in the offence sample were represented in the cases that were withdrawn.

The procedure for withdrawal of cases is a simple one. The prosecutor simply addresses the court as follows: "Your Worship, I have an application to make. I wish to withdraw the case under section 88(a) of the C.P.C.". The application is sometimes accompanied by an explanation, where circumstances are not obvious. Analysis of the 179 case records representing the 272 defendants whose cases were withdrawn under section 88(a) of the C.P.C. revealed that as many as 8 different reasons were advanced by prosecutors as justifications for the applications to withdraw those cases. Table 24 illustrates the reasons for the applications to withdraw as against the number of cases and of the defendants involved.

(i) Lack of or Non-appearance of Witnesses.

As Table 24 indicates, 62 cases (out of the 179 cases), representing 95 defendants (out of the 272 defendants), were withdrawn for lack or non-appearance of witnesses. In the majority of those cases, non-appearance of witnesses was due to the failure of the police to serve them with summonses. It was discovered in this study that the inability of the police to serve summonses on witnesses was a result of a shortage of both personnel and transport.

In one case, the principal witness was abroad and the prosecutor had no idea as to when he would return. Yet in another case the key witness had gone to a remote part of the country and due to poor communication facilities, all efforts to get him back to Lusaka to testify proved fruitless.

It was common in some cases for the prosecutor to apply first for an adjournment of the case to a later date. The idea was that in the mean time, the prosecutor would try to trace his witnesses. It was only after the application for adjournment was refused that an application for the withdrawal of the case was made. Thus in Shachiwala and Mazani,¹⁰ two defendants were jointly charged with stock theft involving two oxen, altogether valued at K4,500. Five months after their first appearance in court, the prosecutor informed the court:

"My witnesses are not here. Summonses were posted to them a month ago. I would like to apply for an adjournment of the case to a later date so that this problem can be sorted out".

In reply, the magistrate said:

"This case took three months to take a plea. Today's trial date (11th. August, 1988), was set on 24th. May, 1988. This means that the state has not been able to serve summonsses on witnesses since 24th. May, 1988. The application for adjournment is refused".

Thereafter, the prosecutor applied for the case to be withdrawn under section 88(a) of the C.P.C.

Defence counsel, if available, do sometimes raise objections to the application to withdraw a case on the ground of lack of witnesses. Under those circumstances, defence counsel would prefer that the prosecution offer no evidence in which case the defendant could be acquitted. In one of those cases, counsel's objection and submission were over-ruled and the court allowed an application to withdraw the case stating that:"...lack of witnesses is an acceptable reason for withdrawing a case under¹¹ section 88(a) of the C.P.C."

(ii) Failure of Complainants to Turn up and Give Evidence in Court.

As Table 24 shows, 87 defendants, representing 59 cases had their cases withdrawn due to the failure of the complainant to come and give evidence in court. In the majority of those cases, the complainant was summoned to come to court in good time. His non-appearance was therefore regarded as an indication of his lack
12
of interest in the matter.

The court's view is that it is in the interest of the complainant to come to court and give evidence and that if he does not, the
13
matter should be withdrawn. Thus in Mungule, the defendant was charged with theft of a goat valued at K150.00. When the complainant repeatedly failed to come to court and give evidence, the prosecutor applied for the case to be withdrawn under section 88(a) of the C.P.C. In allowing the application, the magistrate said:

"The complainant is not here as he has previously done. This is not a case in which we can compel the complainant to come, after all the alleged stolen property is his. In any case, section 88(a) of the C.P.C. gives him a chance to re-activate the case in future if the interest is there".

The problem of securing the attendance of complainants at the court is compounded by the tendency of some of them to change their residence or employment without informing the police as they are expected to do. In one case, the arresting officer told the court: "I went to check on the complainant. I did not find him. I was told that he had gone back to his village and I
14
have failed to get his village address". In some of the 59 cases, complainants provided incomplete or insufficient addresses, thus

making it impossible for the police to trace them.

(iii) The Need to Re-draft the Charge.

Case records revealed that there were two instances in which the police sought to have the case withdrawn in order to re-draft the charge. The first instance involved cases in which a wrong charge was preferred against the defendant in the first place. Later, in the course of the trial, the prosecutor realised that a lesser charge such as theft instead of robbery was preferable or that a more serious charge should have been preferred in the first place.

It seems that magistrates were more willing to allow applications to withdraw if the reason was to lay a more serious charge against the defendant than if the case was the reverse. In Mwanza, for instance, the defendant was charged with robbery involving one box containing cigarrets worth K2,204. On the day the application to withdraw the case was made, the prosecutor told the court:

"This case was set for trial today and all the witnesses are here. After studying the case, I have discovered that the accused person was wrongly charged. He is supposed to be charged with aggravated robbery. I am applying for the withdrawal of the case under section 88 (a) of the C.P.C."

In allowing the application, the magistrate remarked: "Indeed when facts of the case disclose a serious offence, an accused person must be charged with that offence". This ruling was in line with the Court of Appeal (now the Supreme Court) decision in Sakala V The People, in which it was held that it is improper to charge robbery when the particulars of the offence clearly disclose aggravated robbery.

The second instance covered cases in which several people allegedly committed an offence together but in which only one offender or only part of the gang was arrested and initially charged with the offence. Later on his accomplice or other gang members were arrested. The case against one defendant or part of the gang was then withdrawn so that a joint charge covering all the defendants was drafted. Thus in Maweale, Kambambi and Kayombo,²⁰ four men were initially charged with aggravated robbery involving a motor-vehicle valued at K80,000,00. On the 4th. day of the hearing, the prosecutor applied for the case to be withdrawn under section 88(a) of the C.P.C. giving as the reason that: "...more persons have been arrested and are to be jointly charged with the four accused persons".

(iv) Failure of the Police to Bring the Defendants to Court.

As Table 24 indicates, 19 cases representing 28 defendants were withdrawn under section 88(a) on the ground that defendants were not present in court. The particular case would have been adjourned several times in the past on the same ground before the prosecutor finally applied for its withdrawal.

Of the 28 defendants whose cases were withdrawn because of the failure by the police to take them to court, 19 were remanded in custody (either in a Police Station or in Lusaka Central or Remand Prison). Their case records showed that the police failure to bring them to court was due to lack of transport as has²¹ already been mentioned. Only 4 out of 28 defendants had been granted court bail but the police had failed to execute arrest²² warrants, again due to lack of transport.

All defendants remanded in custody, awaiting trial are ferried to courts by police officers. But convicted prisoners, who have other charges pending against them are ferried to courts by prison officers. There have been cases where a prison truck leaves for courts with only a handful of convicted prisoners, leaving behind scores of defendants who also have to appear at the same courts, just because prisoners on remand are not their
23
responsibility.

Much more interesting cases were those in which the whereabouts of the defendants was not known. Five of the 28 defendants represented such cases. This was the result of a break-down in communication or lack of coordination between the arresting officer and the prosecutor on the one hand and the Police Station which initially dealt with the defendant and the Remand Prison on the other. Papers relating to the movement of defendants from Police Stations to the courts (for first court appearance), sometimes get misplaced, resulting in uncertainty about the whereabouts of the defendants concerned. If the particular case was scheduled for trial, the prosecutor would normally take it for granted that the defendant would be at the court. It is often an embarrassment when the prosecutor fails to explain why the defendant is not in court. The most likely course of action is for the prosecutor to first apply for an adjournment of the case to a later date so that the matter could be sorted out in the interim. The courts do not always allow such applications. They often turn them down and instead advise the prosecution to apply
24
for the withdrawal of the case in question. Thus in Mpande, the

defendant was charged with theft of a motor-vehicle, a Toyota car valued at K40,000.00. The defendant was not in court. When the application for adjournment was rejected, the magistrate remarked:

"I would encourage the prosecution to utilise section 88(a) of the C.P.C. and start de novo, seriously and properly organised. Trials should not be adjourned lightly. The main and the only trouble is that no one knows where the accused person is. The case record shows that he is in police custody, the Police Station concerned says that he is in Remand Prison, but as for the prosecution, the position is that you do not know where he is".

(v) Other Reasons for Withdrawal of Cases

There are times when the police take an improperly investigated case to court. The decision to prosecute might not have been taken for the reason that conviction would result but for other reasons such as to "punish the defendant".

In other circumstances, an improperly investigated case may be taken to court in the hope that the defendant would plead guilty. If that does not happen, the police may apply for the withdrawal of the case giving the reason such as: "There are matters
25
that need further investigation". Ten defendants in this study had their cases withdrawn for that reason. In some cases, the need for further investigation may have implications on the way
26
decisions to prosecute are made, as seen in chapter 4.

As indicated earlier, the arresting officer is a key witness for the prosecution. His evidence links the defendant to the alleged offence. He investigates and assembles evidence on behalf of the prosecutor. All exhibits are kept by him and he is responsible for their production in court as evidence. In this study, 7

cases involving 9 defendants were withdrawn because the arresting officer failed to come to court to give evidence. In five of the cases, the arresting officer was reportedly ill.²⁷ In the rest of the cases, no reasons appeared on the case records as to why the arresting officer did not turn up at the court.²⁸

In four cases involving 6 defendants, unforeseeable circumstances, following the defendant's appearance in court forced the prosecution to apply for the withdrawal of those cases. Three defendants had died and the other three became mentally ill.²⁹
³⁰

Section 88(a) of the C.P.C. was meant to be invoked when certain facts, which were unknown at the beginning of the trial, suddenly come to light and which would lead to an unintended outcome of the trial if the case was not withdrawn. It is intended to preempt the acquittal of defendants in cases where such an outcome could bring about public displeasure (though some members of the public may not appreciate the distinction between acquittal and discharge of defendants). In other words, section 88(a) of the C.P.C. is intended to give the state a second chance to bring the defendant back to court to face trial in future on the same facts as well as on the new facts after the matter has been re-examined. In practice, however, it does not happen that way. A withdrawal of a case under this section effectively means an acquittal of the defendant. The police have no resources to revive withdrawn cases as they can barely cope with new cases. It may be said that section 88(a) of the C.P.C. is being used to mask police inefficiency in a manner that was clearly not

intended by the legislature.

Police prosecution in Lusaka and throughout the country has deep-rooted problems. These problems are partly a result of under-funding from the government. Being a wing of the national security establishment, it is difficult to obtain figures on police expenditure. The only available figures show that police expenditure fell sharply between 1980-1982. In 1980, the total expenditure (excluding personal emoluments) was K49,549,003. It fell to K6,792,800 in 1981 and to K2,299,000³¹ in 1982. Even though all reported crime nation-wide decreased over the same period (the rate of all reported crime per 100,000 population was 2582 in 1979, 2612 in 1980, 2347 in 1981 and 2202 in 1982), the fall in expenditure was quite unproportional to the fall in crime rate. It may be pointed out that it was probably the rate of reporting and not necessarily the crime rate which declined. This could have been due to lack of public confidence in the police as will be seen in chapter 8.

It seems that the Police Force comes at the bottom of the priority list within the national security establishment. Resources such as transport allocated to the police are considerably fewer than those allocated to the Army or the Prisons Department, for instance. In the 1986 the Zambia Police Annual Report, the Inspector-General of Police had this to say on the question of transport:

"This problem has been with us for a long time now. All Police Stations have been operating below the allocation available at Independence. Before Independence, each station was allocated 3 vehicles, one for each of the 3 shifts and one vehicle for general administration. At the moment, most Police Stations have only one vehicle used by

all the 3 shifts for 24 hours on a daily basis. As a result, these vehicles do not last long due to over-use".32.

The other reason for failure by the prosecution to carry out their functions effectively is the internal priority ranking of sections within the Police Force itself. Sections, such as the Traffic and Administration Sections are considered more vital to the over-all police functions and are therefore well catered for in terms of transport. Every superior officer has an official vehicle and the Traffic Section has a fleet of well maintained cars and motor-cycles at any one time. At the time of the field work, the prosecution section had one old Land Rover
33
which was constantly breaking down. That Land Rover was serving the two court sites resulting in considerable delays in ferrying defendants from the Remand Prison or from Police Stations to the courts.

As a result of this neglect, police officers serving in the prosecution section have come to believe that prosecution is not an essential part of police work. The police duty, as far as they are concerned, ends with the investigation of crime and the apprehension of defendants. Thereafter, another organ of the state, preferably, the Attorney General's Chambers should take
34
over from the police and prosecute.

Another consequence of this neglect of the prosecution section within the Police Force has been a fall in the standard of prosecution. Even though the law, as seen in chapter 2 specifies that one has to be of the rank of Sub-Inspector and above in

order to qualify for training and appointment as a prosecutor, that is not always the case in practice. We encountered in this study a number of prosecutors who were of the constable rank (the lowest rank). The reason for this is that police officers do not stay long in the prosecution section due to poor prospects of promotion. Consequently, at any one time, the prosecution section is composed of young and inexperienced constables. Thus one magistrate commented about prosecution as follows:

"The problem is that senior officers have abandoned prosecution work and have left the job to very young constables. Prosecution should be conducted by senior police officers. Because of poor prosecution, sitting on the bench is no longer a pleasure. The job of the magistrate is made difficult, tedious and unenjoyable".³⁵

There is also a lack of internal accountability and supervision within the prosecution section which junior officers have taken advantage of. Investigating officers have been known to make false reports indicating that they had made efforts to serve summonses on witnesses but did not find them because they had moved to unknown addresses. Because of the lack of accountability and supervision, there is no way in which superior
36
officers can check the validity of those reports.

Further, there is a lack of professionalism in the prosecution process. While the prosecutor has had an additional training in trial procedures and assembling evidence, the arresting officer has had no such training. Thus, if the arresting officer is of a superior rank to that of the prosecutor, serious problems may arise especially in border-line cases. The prosecutor is inhibited from pointing out defects in the case by the rules of subordination which exist within the police hierarchy. This, at

times results in the taking of improperly investigated cases to court, which are later withdrawn. At a 1987 Judges and Magistrates' seminar, held in Lusaka, this problem was addressed and it was suggested that where possible, a prosecutor should be of a superior rank to that of the arresting officer.

Lastly, there is a notable lack of coordination of functions both within the Police Force and between the Police and the Prisons Department at some crucial points in the criminal process. This has also adversely affected the prosecution functions.

In view of the above police operational problems, it is understandable why the prosecution or even the courts do not invoke the Subordinate Courts Act and the provisions of the C.P.C. compelling the attendance of witnesses at the courts. Section 42 of the Subordinate Courts Act, provides for an offence of "contempt of court" if a witness, having been properly summoned to appear in court to give evidence, fails to do so without an excuse. A warrant to bring such a witness before the court may be issued under section 144 of the C.P.C. If there is evidence that a witness cannot attend court unless he is compelled to do so, a warrant for his arrest may be issued under section 145 of the C.P.C. to ensure his attendance. Further, section 148 of the C.P.C. provides for the penalty of K40 fine (about 25p) or 15 days imprisonment for a witness who fails to attend a court hearing without a lawful excuse. The prosecutors are aware that even if they invoked these provisions, their colleagues in the investigations wing of the prosecution section would not execute the warrants, owing to the operational problems

already seen above. Courts are also aware of the futility of
37
invoking contempt of court provisions. It is a vicious circle
which can only be broken by proper funding of the prosecution
section.

5:2B Cases Withdrawn under Section 201 of the C.P.C. and the
Reasons for Withdrawal.

Section 201 of the C.P.C. reads as follows:

"If a complainant, at any time before a final order is
passed in any case under this part, satisfies the court
that there are sufficient grounds for permitting him to
withdraw his complaint, the court may permit him to
withdraw the same and shall thereupon acquit the accused".

In Zambia the person who reports a crime to the police is called
the complainant and in most cases he is also the victim of the
38
crime. The complainant must satisfy the court that there are
"sufficient grounds" for the application to withdraw the case.
Under section 201, as is the case under section 88(a) of the
C.P.C. the final decision to withdraw the case lies with the
court. But unlike section 88(a), the defendant under section 201
is acquitted once the case has been withdrawn.

In this study, 129 cases representing 172 defendants were
withdrawn under section 201. Sixteen cases representing 22
defendants involved juveniles. Only four of the 172 defendants
were females. As Table 23 shows, all offence categories in the
offence sample were represented in the 129 cases that were
withdrawn under section 201.

The process of withdrawal usually begins after the defendant has
made 3 or 4 court appearances. The complainant approaches the
defendant or his representative while the latter is held in

custody or is on bail, with a proposal to have the matter withdrawn from the court. They then agree on the terms of the withdrawal, which usually involve the payment of some money or the restitution of stolen property and in some cases both compensation and restitution. The complainant then informs the police of his intention to withdraw the case. The police rarely refuse to cooperate with the complainant. They are aware that if they refuse, the matter would end up being withdrawn later in court by the police themselves under section 88(a) of the C.P.C. because the complaint, now antagonised by such refusal, would not be available to give evidence.

The police insist that all cases should be withdrawn in court, in order to ensure fairness in the process. In court the prosecutor informs the magistrate that the complainant has an application to make. The court then orders the complainant to take his place in the dock and make a verbal application to withdraw the case, stating the reason or reasons for the application. The case of The People v Daka, observed in an earlier study, illustrates the procedure for withdrawal under section 201 of the C.P.C. In that case, the defendant was charged with burglary involving clothing and a radio, all valued at K5,600.00. After the complainant had entered the dock, the proceedings went as follows:

Court: "What do you want to say"?

Complainant: "I want to withdraw the case"

Court: "Why do you want to withdraw the case and why did you take so long"?

Complainant: "My family has just advised me to withdraw the

case".

Court: "Tell us why you want to withdraw the case and not what your family wants you to do".

Complainant: "I feel pity for the accused person and I wish to forgive him".

Analysis of case records revealed a variety of "sufficient grounds" on which applications to withdraw cases were allowed as illustrated in Table 25.

(i) Humanitarian Grounds.

As table 25 shows, 33 defendants had their cases withdrawn by the complainant on humanitarian grounds. Humanitarian grounds meant, for instance, that the defendant was a student and needed to⁴¹ continue his schooling, was sick and needed medical attention,⁴² or was repentant and apologetic.⁴³

The decision to withdraw a case on humanitarian grounds was in many cases influenced by the complainant's religious beliefs.

⁴⁴ Thus Nkomesha was a typical example. In that case the defendant was charged with house breaking involving bedding and clothes, all valued at K120.00. When the complainant applied for the case to be withdrawn, he gave the reason as: "I am a Christian and I wish to forgive the accused person".

(ii) The Defendant was a Good Servant and the Complainant/ Employer Wanted to Deal with the Matter Administratively.

As Table 25 indicates, 24 defendants had their cases withdrawn on the ground that they were generally good servants. The complainant felt that the offence was a mere lapse which was unlikely to recur. In some of those cases, the defendants were

even given back their jobs after a few months under suspension
45
from work.

In the cases involving employees in the parastatal and public sector, employers or their representatives felt that an
46
administrative action was enough punishment. Thus in Mpundu, a stores clerk working for Zambia Electricity Supply Corporation (ZESCO), was charged with theft by public servants involving 20 boxes of carbon paper worth K1,200.00. In the course of the trial, the Senior Personnel Officer was sent by the Corporation to withdraw the case. He told the court: "...the accused person has been dismissed and according to the management, that is enough punishment".

(iii) The Complainant Was Related or otherwise Known to the Defendant.

Thirty-two of the 172 defendants had their cases withdrawn because of the existing relationship or friendship with the complainant. In one case, the complainant withdrew the case
47
because the defendant was his nephew, whilst in the other case, the complainant gave the reason that the defendant was his son-
48
in-law and would not let him go to prison.

In some cases, the existing relationship between the defendant and the complainant was considered in the light of other
49
circumstances surrounding the defendant. In Chila for instance, the defendant was charged with burglary involving a stereo system valued at K8,710.00. In his application to withdraw the case, the complainant stated his reason as:

"This man (the defendant), is my brother-in-law. He is the

only one in gainful employment and capable of looking after his large family. I do not want him to go to prison".

The nature of friendship between the complainant and the defendant was quite diverse. In the majority of cases it was the friendship between the complainant and the defendant which was stated as the reason for the withdrawal of the case. Some cases, however, were withdrawn because of the friendship between individuals related to both the complainant and the defendant. In one case for instance, the complainant gave the reason for withdrawing the case as: "...my mother and the mother of the accused person are friends". In another case, the complainant gave his reason as: "...the accused person is the younger brother of my friend".

In all cases in which the existing relationship or friendship was cited as the reason for the withdrawal of the case, there was one underlying message. The message was a desire on the part of the complainant to preserve the existing relationship or friendship. In Shindole, for example, that desire was clearly spelt out. In that case, the defendant juvenile was charged with burglary involving two radio cassettes valued at K10,000.00. In his application to withdraw the case, the complainant stated his reason as follows:

"The mother of the accused juvenile is so close to me that if her son goes to prison, I will sour the relationship and I will be having guilty feelings. Besides, his father (the juvenile's), is my workmate and we have worked together for a long time. I am confident that he is capable of disciplining his boy in future".

(v) Other Reasons for Withdrawal of Cases.

Eighteen defendants had their cases withdrawn on the ground that the complainant and the defendant shared the same neighbourhood. In some of those cases the mere fact that the complainant and the⁵⁴ defendant were neighbours was sufficient reason. In other cases,⁵⁵ additional reasons were cited. Thus in Phiri, the defendant was charged with robbery involving K200.00. cash. In his application to withdraw the case, the complainant gave his reason as: "...the accused person is my neighbour. Besides, he is an orphan and his aunt has pleaded with me".

Sixteen of the 172 defendants had their cases withdrawn because they agreed to compensate the complainants concerned. In some of those cases, compensation had been paid before the day of the⁵⁶ withdrawal of the case. In other cases, the complainant applied for the withdrawal of the case on the strength of the promise to⁵⁷ pay compensation. Compensation in the majority of cases involved payment of money, equivalent to the value of the stolen item, while in a few cases it involved restitution or return of the⁵⁸ actual stolen item. Thus in Mweemba and Others, three defendants were charged with stock theft involving two cows valued at K1,500.00. In giving his reason for application to withdraw the case, the complainant stated: "...the accused persons have agreed to bring two cows". The payment of compensation or the promise to pay was not always made by the defendant himself. In⁵⁹ some cases, the defendant's close relatives such as the parents⁶⁰ or the wife handled the matter on his behalf.

Some complainants decided to have their property back once it was

recovered and then withdrew cases against defendants. That was particularly the case where the complainants were somewhat worried about the safety of their property in police custody such as cash during the course of the trial.⁶¹ In other cases, the property stolen was so essential to the life of the complainant that a long trial would seriously inconvenience him. Thus in ⁶²Chongo, the defendant was charged with theft from a motor-vehicle involving two tyres and a jack, all valued at K1,290.00. The complainant promptly withdrew the case once the items were recovered saying that he badly needed the tyres.

In this study, 16 defendants had their cases withdrawn for the reason that property was recovered and complainants saw no need to persue the matter further. As indicated in chapter 4, the police, in the majority of cases would discourage applications to withdraw cases solely on this ground. An exhibit in the form of property stolen is an important piece of evidence that the police would rely on to prove their case against the defendant.

Lack of interest in the matter on the part of the complainant, resulting in his inability to attend court hearing was the reason cited for the withdrawal of cases affecting 15 defendants. In some of those cases, the complainant lost interest in the case after realising the loss of profit or the inconvenience to be suffered by him as a result of his attending court and giving evidence.⁶³ In Haakalima, for example, a watchman was charged with theft by servants involving two tyres valued at K800.00. In his application to withdraw the case, the complainant gave the reason as:

"It is impossible to represent the company in court for any prolonged length of time. After weighing the time involved in pursuing the matter against the seriousness of the offence, the company decided to withdraw the case".

In another case, the complainant, a medical doctor gave the following reason for his application to withdraw the case:

"I do not have enough time to attend court. At one time I attended court, I found that a child had died at the Hospital for lack of attention. I do not feel pity for the accused person, but I am not prepared to give evidence".⁶⁴.

Yet in other cases, the inability of the complainants to attend court was because they had to make trips abroad in the course of the trial. They informed the police about their plans and then applied to the court to have the cases withdrawn before they left the country.⁶⁵

Section 201 of the C.P.C. was intended to cover misdemeanours and not felonies. Property offences were therefore not originally intended to be withdrawn under this section. The section in question was intended to be read with section 8 of the C.P.C. which states as follows:

"In criminal cases, a subordinate court may promote reconciliation and encourage and facilitate the settlement in amicable way, of proceedings for assault, or for any other offence of personal or private nature, not amounting to felony and not aggravated in degree, in terms of payment of compensation or other terms approved by such court and may thereupon order the proceedings stayed".

The reason why property offences, even serious ones such as robbery and burglary are today withdrawn under section 201 of the C.P.C. is not clear. The police are aware of the fact that the underlying reason for withdrawal of cases by complainants is the payment of compensation, which in some cases is in addition to

the restitution of property. In some cases, the police do advise complainants to advance reasons for withdrawal which are acceptable to the court such as the defendant is a "friend", a "relative" or a "neighbour". This is done in order to prevent commission of the offence of "compounding felonies" under section 113 of the Penal Code.⁶⁶ In some cases, however, no such advice was given and complainants expressly informed the court that they wished to withdraw the case because the defendant or his representative had agreed to or had already paid them compensation.

Magistrates are also aware of the above underlying reason for the withdrawal of cases and are not entirely happy with it. They feel that their powers to preside over felonies are being eroded but are seemingly powerless to stop the withdrawal of cases. This practice may be seen as an indigenous response to the legal order imposed by the colonial power.⁶⁷

Withdrawal of cases under section 201 of the C.P.C. also shows that despite the intrusion of Western culture and spread of urbanization and apparent anonymity in the urban areas, inter-personal relationships are still strong in Lusaka. Inter-personal relationships played a significant role in the withdrawal of some cases. Those relationships were based on social (friendship, neighbourhood), economic (employment) or familial ties. The need to preserve or improve the existing relationships was a major factor in reaching the decision to withdraw. In some cases therefore, it seems that the property offender most likely to be prosecuted and convicted is one whose victim is a total stranger.

There was also some element of fear of the consequences of the defendant's imprisonment on the part of the complainant. It would appear that a substantial number of complainants were of the view that imprisonment was the punishment the defendant was to receive upon conviction. Consequently, some complainants felt that if they did not withdraw the case, they would ultimately be blamed for the defendant's plight in prison and the likely strain on the existing relationships. Because of the large number of property offenders sent to prison, the public has been led to believe that imprisonment is the standard punishment and other penalties are exceptional. It will be seen in chapter 8 that property offenders have been singled out by magistrates in Lusaka for custodial sentences.

This study has further shown the complainant's dominant role as a "third force" in the administration of criminal justice in Lusaka magistrates' courts. That role is almost as important as that played by the traditional parties in criminal process, i.e. the prosecution and the defence. As seen in chapter 4, if the complainant does not pledge his support for prosecution (i.e. his willingness to give evidence in court), the matter in most cases is not taken to court. On the other hand, if he agrees to cooperate in the trial process, but at the time that he is required to give evidence in court, he cannot be found, the case is normally withdrawn at the instance of the police under section 88(a) of the C.P.C as seen above. Further, if in the course of the trial, the complainant reaches a settlement with the defendant or his representative, he can seek the withdrawal of

the case from the court under section 201. We saw in chapter 2 that under customary law and procedure, the victim of crime had a significant role to play in the criminal processs. He was not just a witness (for the prosecution) but was a party to the proceedings. The victim had for instance, the right to seek a stay of execution of punishment by appealing for mercy to the chief on behalf of the defendant. It may be said that on the whole, despite the proscription of customary criminal law, as seen in chapater 2, its notions of justice continue to influence the behaviour of the courts, defendants and complainants alike. Professor Allott has pointed out that: "One of the more surprising features of African legal systems is the refusal of
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old laws and ways to die away"

5:2 (C) Nolle Prosequi.

Under sections 81 and 82 of the C.P.C. the Director of Public Prosecutions, (D.P.P.) is empowered to withdraw a case at any time before judgment is delivered. This is done by entering a notice of discontinuation of proceedings known as nolle prosequi. Section 81 (the key section) of the C.P.C. reads as follows:

"In any criminal case and at any time thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a nolle prosequi either by stating in court or by informing the court in writing that the People intend that the proceedings shall not continue and thereupon, the accused shall stand discharged in respect of the charge for which the nolle prosequi is entered, and if he is on bail his recognizances shall be treated as being discharged but that discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts".

Nolle prosequi is an order to the court and once entered, the court hearing the case must comply and discharge the defendant.

The D.P.P. or indeed any other public prosecutor entering it is under no obligation to state reasons for it.

In this study, 10 cases representing 13 defendants or 2.8% of all the withdrawn cases came under nolle prosequi. Six of the 13 defendants were charged with aggravated robbery. Magistrates' courts, the focus of this study, however, have no jurisdiction to try defendants charged with aggravated robbery. Their jurisdiction in those cases is limited to preliminary inquiry and committal proceedings to the High Court for trial. In the case of those 6 defendants, their cases were withdrawn during the preliminary hearing.

Much more interesting are the four cases involving 7 defendants who were tried in the magistrates' courts. The four cases were theft by servants (2 cases) and theft of a motor-vehicle and robbery (one case each).

The use of nolle prosequi in magistrates' courts is not very frequent. But its use is strongly disapproved of by magistrates and defence counsel where they appear. Magistrates feel that the commanding power of nolle prosequi undermines their prestige as they cannot question it. On the other hand, defence counsel feel that nolle prosequi is abused in some cases in that it is entered in order to pre-empt an impending acquittal of the defendant.

One case needs to be mentioned in detail because it summarises the views of both the magistrates and defence counsel on the matter. In Banda and Mufungulwa, two defendants were jointly

charged with theft of a motor-vehicle, a Peugeot 504 car valued at K65,000.00. Nine months after they first appeared in court, the prosecutor entered a nolle prosequi. The defence counsel representing accused number 2 made the following remark:

"I have an observation to make. I object to the entry of nolle prosequi for the reason that it prejudices my client as the charge will be kept in abeyance for a long time. If there is insufficient evidence, the prosecutor should offer no evidence against my client and he should accordingly be acquitted".

The defence counsel representing accused number 1 then made the following statement:

"I have nothing to say except that the powers of the state are clearly being abused. We have gone a long way in this matter. If there was a way, any way at all, I would object but I am completely powerless".

After hearing the views of both counsel, the magistrate made the following statement:

"I agree with both defence counsel on their sentiments. After having gone through 14 long witnesses, the D.P.P. decides to abuse his powers by entering a nolle prosequi. I should mention that while he has the power to do so, he should not waste our time. There is no need to bring a case to court if it is not due for trial. We are not here to play games or to conduct any of our business in uncertainty. In the time that I have dealt with this case, I should have been able to complete many cases. However, the accused persons are discharged accordingly".

Even though the use of nolle prosequi is disapproved of, there is little hope that it will cease to be part of the criminal process in Zambia. There is also little hope that it will be modified in a way that will empower courts to question it. In some cases, the decision to enter nolle prosequi may be well intended. There may well be cases in which the continued prosecution of the defendant could conflict with other public interests such as the protection of information related to public security. In addition, it stands as a symbol of the independence

and the discretion which the D.P.P enjoys in the execution of his duties. The unfortunate thing, however, about nolle prosequi is that it is mostly invoked in cases where there is no sufficient evidence against the defendant so as to pre-empt his acquittal.

5:3 Cases Dismissed under Section 199 of the C.P.C.

Section 199 of the C.P.C. empowers the courts to dismiss a case on the ground that the complainant has failed to come to court and give evidence after having been properly summoned. The section reads as follows:

"If in any case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to summons served upon him at the time and place appointed in the summons for the hearing of the case or is brought before the court under arrest, then if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall dismiss the charge, unless, for some reason, it shall think it proper to adjourn the hearing of the case until some other date upon such terms as it shall think fit in which event it may, pending such adjourned hearing either admit the accused to bail or to remand him to prison or take such security for his appearance as the court shall think fit".

Unlike the withdrawals considered earlier, under sections 88(a), 201 and 81, section 199 of the C.P.C. allows the court, on its own, initiative to dismiss a case on the ground, as seen above that the complainant has for no reason failed to come to court. A defendant whose case is dismissed under section 199 is acquitted as is the case under section 201 of the C.P.C.

In this study, 15 cases representing 17 defendants were dismissed under section 199 of the C.P.C., as Table 23 shows. Offences for which cases were dismissed were theft by servants and by public

servants, house breaking, burglary and aggravated robbery. Case records showed that only 5 of the 15 cases were dismissed because the complainant failed to appear at the court. Nine of the 10 other cases were dismissed for reasons which were apparently outside the provisions of section 199 of the C.P.C. The court dismissed one case for instance, on the ground that "the witness⁷¹ has failed to come to court after having been warned previously". In 8 of the 10 cases, the prosecutor had applied for each of the cases to be withdrawn under section 88(a) of the C.P.C. because there were no witnesses. In each of those cases, the court refused the applications to discharge the defendants under section 88(a) and instead, dismissed the cases under section 199 of the C.P.C. In one of the 8 cases the magistrate gave the⁷² reason for the dismissal as "the case lacked merit", whilst in the other, the reason for the dismissal of the case was stated⁷³ as: "the case has no chance of success". In the 10th case, no reason for its dismissal appears on the record.

It seems that magistrates in the majority of the 15 cases did not properly apply section 199 of the C.P.C. That section allows courts to dismiss cases in which the complainant fails to come to court after having been properly notified. In this study, some cases were dismissed for failure of a witness to come to court. Those cases should have been withdrawn under section 88(a). It has been seen above that failure by the witness to come to court led to the withdrawal of 62 cases involving 95 defendants under section 88(a) of the C.P.C. Section 199 should only be used in cases where the prosecution does not invoke section 88(a) and the court is of the view that injustice would

result if the case were not dismissed and the defendant acquitted. Similarly, cases which were dismissed under section 199 not because the complainant failed to appear, but because they "lacked merit" should have ended in the acquittal of the defendant under section 206 of the C.P.C. discussed bellow.

5:4 Cases which Ended in Acquittal of Defendants.

Acquittals are pronounced under section 206 of the C.P.C which reads as follows:

"If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him".

This study found that 117 defendants out of a total of 1129 defendants in the sample were acquitted (see Table 23). Analysis of case records revealed that magistrates gave 3 different reasons for the acquittal of defendants. Those reasons are presented in Table 26. As Table 26 shows, 47 defendants were acquitted because magistrates felt that the cases against them were not proved "beyond all reasonable doubt". The failure to prove a case beyond all reasonable doubt was itself of 3 types.

The first type involved cases in which there were fundamental contradictions in the prosecution's evidence. Thus in Lungu and
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Chilufya, the two defendants were jointly charged with burglary involving a radio cassette worth K60.00. At the close of the trial, the magistrate said:

"I have found that the evidence from state witnesses has left a lot of questions unanswered, such that there is a doubt as to the guilt of the two accused persons. I therefore acquit

them".

The second group of cases were those in which the prosecution evidence was discredited in cross-examination. The magistrate deemed it unsafe to convict on that evidence and therefore⁷⁵ acquitted the defendant. The third group of cases were those in⁷⁶ which there was no corroborative evidence. In Chongo, for instance, the magistrate at the end of the trial stated:

"I have heard the available evidence and I have failed to find some piece of evidence that can be treated as or corroboration. As such, I have no alternative but to acquit the accused person".

It has already been mentioned in chapter 4 that the facts of the case must disclose the offence charged and in connection with the defendant. Disclosure of the charge establishes a prima facie case which enables the court to find the defendant with a case to answer and put him on his defence.

Failure on the part of the prosecution to adduce evidence that would establish a prima facie case in this study led to the⁷⁷ acquittal of 36 of the 117 defendants. In Mubanga, for instance, the defendant was charged with burglary. At the close of the prosecution case, the magistrate remarked:

"Since the element of entry is not shown to this court, there is no prima facie case against the accused person. I am unable to go into other details. In this case the accused person has no case to answer and he is therefore acquitted".

Thirty-four of the 117 defendants were acquitted because the prosecution offered no evidence against them. Typical cases were those in which the police had probably arrested a wrong person.⁷⁸ Thus in Zulu, the defendant was charged with stock theft

involving 11 cows. all valued at K100,00.00. Three months after the first appearance, the prosecutor told the court: "The available evidence does not connect the accused person with the offence. We therefore offer no evidence".

The other group of cases in which the defendants were acquitted were those in which the prosecution first applied for the withdrawal of the case under section 88(a) of the C.P.C. After refusing the application to withdraw the case, the magistrate felt that there was no evidence against the defendant and acquitted him. In Malambo and Others,⁷⁹ for instance, three police and customs officers were jointly charged with theft by public servants involving 3 suitcases containing a drug called mandrax, valued at K187,000.00. In the course of the trial, the prosecution applied for the withdrawal of the case under section 88(a) of the C.P.C. on the ground that the witnesses, who were the owners of the drug were abroad, but were due to return in a year's time. The magistrate refused the application and acquitted the defendants stating:

"To allow a withdrawal of the case on those grounds would be a clear perpetration of injustice. The prosecution is therefore offering no evidence and as such I acquit the accused persons".

It would appear that the circumstances upon which acquittals are pronounced are rather narrow. Bona-fide claim of right is a recognised defence to a charge of theft or any other offence involving the taking of property. In this study, however, none of the defendants was recorded as having successfully raised that defence. The reason for this is probably the lack of legal

representation in the magistrates' courts.

5:5 The Acquittal Rate.

It is important for planning purposes to determine the proportion of people accused of property offences, who were acquitted. This, in effect means the calculation of the acquittal rate. The task was made easier by the fact that all the defendants in this study faced one charge to which they pleaded guilty or not guilty. In other words, there was no risk of including defendants (in the calculation of the acquittal rate), who pleaded guilty to some of the charges but not to others.

In addition, the "not guilty" pleas did not in this particular analysis, include cases in which the defendants were acquitted after the prosecution offered no evidence. It also excluded cases in which defendants were acquitted because of the failure of the prosecution to establish a prima facie case. Inclusion of those cases would inflate the acquittal rate. Only cases in which defendants were acquitted after a full trial were included, i.e, only 47 out of the 117 defendants as Table 26 shows. It can be seen from Table 27 that of the 538 convicted defendants in this study, 229 pleaded not guilty, 308 pleaded guilty and in the case of one defendant, his case record did not specify the plea that was tendered. The over-all acquittal rate, calculated on the basis of the 47 defendants who pleaded not guilty and were acquitted after a full trial as against the 229 defendants who pleaded not guilty and were convicted is 20.5%.

Table 27 also shows acquittal rates for individual offences,

calculated on the same basis as the over-all acquittal rate. It is clear from that Table that the acquittal rate for defendants charged with theft by public servants and for stock theft was proportionately higher than for the rest of defendants. In the case of the former offence, the reason is probably that most defendants could afford private legal representation as legal aid is generally not available for property defendants appearing in magistrates' courts as already seen (chapter 2 and 4). But it is difficult to tell whether all those acquitted of theft by public servants were legally represented because case records for the acquitted defendants, unlike those for convicted ones, have no⁸¹ indication as to whether counsel appeared or not. Further, the small number of legally represented defendants and the lack of information about the extent of legal representation among the acquitted defendants (for theft by public servants), makes it impossible to establish an association between legal representation and the rate of acquittal.

In the case of stock theft, the reason for high acquittal rate could probably be attributed to the particular problems of presentation of evidence in these cases. It is not uncommon for instance, for exhibits to go missing while in the custody of⁸² police officers. The case of The People V Zulu and Others, may be cited to illustrate the nature of the problem. The case involved theft of 10 herd of cattle valued at K25,000.00. The complainant informed the court that he had made some identification marks on the ears of each stolen animal. He also said that one carcass, several cuts and the ears found on the

defendants were seized by the police as exhibits. When time came for the police to tender the exhibits in evidence, only the skins were produced, thus prompting a comment from the magistrate: "something is seriously wrong with the police these days". The police explanation for their failure to produce all the exhibits was that there were no preservation facilities at the Police Station for fresh exhibits such as meat. The question from the magistrate as to why they did not sun-dry the exhibits only drew silence from the prosecutor.

Table 23 shows a relationship between high figures for withdrawals on the one hand and low figures for both convictions and acquittals on the other, particularly in the case of theft of a motor-vehicle and robbery. This relationship probably means that weak cases which otherwise would have ended in acquittal were promptly withdrawn by the police, thus inflating the withdrawal figures for both offences. This probably also explains why none of the defendants charged with robbery were acquitted.

5:6 Conclusion.

We have examined the trial process in the magistrates' courts in Lusaka. It has been found that contrary to the official view that too many defendants are being acquitted in magistrates' courts, this study has not found any convincing evidence to back that view. As a matter of fact, the acquittal rate found in Lusaka is much lower than what has been found elsewhere. For instance, a study in London found that the acquittal rate at the Old Bailey and the Inner London Crown Court was as high as 37%. A Nigerian study found a much higher acquittal rate of 44%. The

Zambian official view is probably based on the apparent lack of appreciation of the distinction between acquittals under section 206 on the one hand and withdrawals under sections 81 and 88(a) as well as dismissals under section 199 of C.P.C. on the other. A word may be said about court procedures. Matters of procedure and practice in the magistrates' courts, are regulated by section 12 of the Subordinate Courts Act (Cap 45 of the Laws of Zambia) states:

"The jurisdiction vested in Subordinate Courts shall be exercised (as far as regards practice and procedure) in the manner provided by this Act and the Criminal Procedure Code or by such rules and orders of the court as may be made pursuant to this Act and the Criminal Procedure Code, and, in default thereof, in substantial conformity with the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction".⁸⁶

The adversarial system in which the magistrate sits as an independent arbiter still flourishes as a legacy of the common law. But the adversarial system presupposes some measure of⁸⁷ equality of resources between the prosecution and the defence. It is not surprising therefore that a large number of interviewed offenders claimed that they found the court room setting strange and "intimidating". As seen in chapter 2, the court room setting in magistrates' courts is distinctly different from the traditional set up of hearing disputes.

On the other hand, complainants feel frustrated by certain rules of evidence such as the presumption of innocence and maintenance of silence. In cases where the complainant himself apprehended the defendant in the act, these rules, from the point of view of the complainant, seem to serve the interests of the defendant.

As seen in chapter 3, defendants have taken undue advantage of these rules.

The language of the court is unfamiliar to many defendants and complainants alike and besides, it is poorly translated. In chapter 3, we saw that many of the interviewed offenders were illiterate or semi-literate and therefore most uncomfortable with the English language. In Zambia, a command of the English language is associated with a level of education beyond Grade Seven. Most offenders in this study had seven years of education or below. Hence interviewed offenders were clearly unhappy with the language of the court. They claimed that they failed to grasp the translated distinction between "understanding the charge" and "admitting or denying the charge" at the time of the plea. The linguistic barrier limits the ability of the consumers of criminal justice to follow proceedings. It also reinforces the feeling that magistrates' courts are alien institutions.

It may be stated therefore that criminal justice in Lusaka's magistrate's courts today, especially its procedural aspects, does not serve the interests of the majority of the people. It serves the interests of the few enlightened individuals who are familiar with the language of the court as well as its procedures. In any case, these people do not have to worry about the technicalities of procedures and the "intimidating" nature of the court room setting because they have access to private legal representation. The majority of the people have been alienated from the system and see in its technicalities, only a
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suppression of justice. This offers an additional explanation

as to why so many witnesses failed to come and give evidence in court, resulting in the withdrawal of the cases in which they were involved.

The lack of resources for the police, the relegation of the prosecution branch to the bottom of the priority list within the Police Force, the lack of professionalism in the prosecution branch and the lack of coordination of police functions within the Police Force and between the Police Force and the Prisons Department at the crucial points in the prosecution process, have rendered the prosecution system dysfunctional. As a result, some consumers of criminal justice have lost confidence in and have been alienated from the prosecution process. Both the witnesses and complainants feel less inclined to turn up and give evidence because they are discouraged by the inability of the police to perform diligently. Cases in which they are involved end up being withdrawn. A significant number of offenders are therefore not punished because it is inconceivable that all the 272 defendants in this study, whose cases were withdrawn at the instance of the police could have been acquitted had their cases been prosecuted to the full limits of the law. Later in this thesis, we shall see how some of these problems have adversely affected the ability of the police to perform the other statutory function, i.e, crime prevention (chapter 8).

On the other hand, there seems to be an association between the technical procedures and the available remedies on the one hand and the withdrawal of some cases by complainants under section 201 of the C.P.C. on the other. Many victims of crime are

'unhappy with the current regime of sentencing which favours the imprisonment of offenders, rather than the compensation of the victim (chapters 6 and 7). This is not a new phenomenon. As seen in chapter 2, many victims of crime showed their dissatisfaction with the system during the colonial period by refusing to take their cases to the District Commissioners' courts and later to the magistrates' courts. Witnesses fled when summoned to give evidence in court. The withdrawal of cases in Lusaka magistrates' courts today should therefore be seen as a manifestation of the continued rejection of the current court procedures and the remedies.

The rejection of certain aspects of a criminal justice system by people who feel alienated from it has been reported from elsewhere in Africa and Asia. In the urban areas of Kano, Zaria and Kaduna, Nigeria, new "courts" emerged in the early 1950s among the Southerners, who were not satisfied with the English type magistrates' courts.⁸⁹ In Freetown, Sierra Leone, tribal headmen were hearing cases in the late 1950s although they were expressly forbidden by legislation to preside over criminal cases. Those "courts" strictly speaking were illegal, but flourished because they had the support of the people who wanted⁹⁰ a system with which they could indentify themselves. In Papua New Guinea, the new system of dispute settlement introduced by the colonial power did not destroy the traditional forms of settling disputes which continued to function unofficially. According to one writer, "this in part represented the people's⁹¹ rejection of the unsatisfactory colonial technique". More

recently, studies from Tanzania and Nigeria have provided further evidence of the relationship between falling confidence in criminal justice system and the desire for those alienated from it to seek alternative justice.⁹²

Later in this thesis (chapter 9), we shall suggest that a new sentencing policy, based on the customary system of compensation could remove the incentive on the part of some complainants to withdraw cases.

On the other hand, the practice of withdrawal of cases by complainants, for reasons that have nothing to do with the lack of compensation (such as the pre-existing relationship between the parties) should be encouraged. Those cases eventually end up being withdrawn by the police because of the lack of witnesses.

In order not to waste the court's time, (on the average cases were withdrawn 3 months after the beginning of the trial), these kind of cases must be identified earlier in the process, say at the time of making the report to the police. If, at that time both parties agree that a withdrawal of the case is the best course of action, the case should go before the magistrate at once for a withdrawal hearing.

Notes

- 1 Section 204 of the C.P.C.
- 2 The procedure for service of summonses is spelt out in sections 93, 94 and 95 of the C.P.C.
- 3 Section 207 of the C.P.C.
- 4 Section 157(1) of the C.P.C.
- 5 Op cit.
- 6 This is the position, for instance, in England. See M.McConville and J.Baldwin, op cit, 1977, 89. In Kenya, only 4% of the cases studied by Clegg et al, were withdrawn, op cit.
- 7 For instance, Phiri, 2P1/57 (1988), Mulenga, SSP-40 (1986), Zulu, Kanyika and Kalinda, 2P2-160 (1985).
- 8 Zulu, PB-21 (1988).
- 9 Nyirongo, 3PB-345 (1984).
- 10 SPB-47 (1988).
- 11 Chulu, Mulubwe and Silomba, SP-45 (1986).
- 12 See, for instance, Malata, SP-407 (1987).
- 13 SP-193 (1988).
- 14 Mulenga, Mbewe, Nkandu and Kabwe, SP-291 (1985), see also Mbewe, 3PB-368 (1984).
- 15 Mwape, 3P-587 (1989).
- 16 See, for instance, Miti, Chishimba and Kamba, SP-81 (1984) a case withdrawn "reluctantly", the magistrate saying: "It is not my policy to allow withdrawals when serious allegations are made against the accused person". See also Tembo, SPB-2P (1988).
- 17 SP-311 (1988).
- 18 In the Mwanza case, above (foot note 17) the magistrate nearly refused to allow the withdrawal because the prosecution took too long to make the application- 4 months elapsed between the time of the plea and the time of the application to withdraw was made. The magistrate allowed the application because "aggravated robbery is a very serious offence and the accused must answer to it".
- 19 [1973] Z.R. 8.
- 20 SP-176 (1989), See also Mubanga, 2P2-1629 (1988) and

Mbewe, 1PB-147 (1987).

21 See chapters 2 and 4.

22 See, for instance, Banda and Banda, 3P-74 (1989) and Musoni, 2P1-66 (1988).

23 For a classic case of the lack of coordination in the use of transport between the Police Force and the Prisons Department, see The Times of Zambia, December 30th. 1987.

24 SP-120 (1988).

25 See, for instance, Nkata, PB-8 (1978) and Simukonde, 2P-32 (1986).

26 See, for instance, Banda, 2P-277 (1984) in which the prosecutor said that he was applying for the withdrawal of the case because he had no witnesses as opposed to non-appearance of witnesses.

27 Silungwe, 1PB-192 (1988), Simbwalanga, SP-199 (1988), Kapandula, SPB-17 (1988).

28 Banda, SPB-39 (1988), Mbewe, SSP-47 (1986), Lukoma, SSP-81 (1986).

29 Pelekelo, PB-189 (1986).

30 Mulutula, 3SP-377 (1986).

31 See Zambia Police Annual Report, 1982, 16.

32 See Zambia Police Annual Report, 1986, 1.

33 On 16th. December, 1987, the Land Rover broke down bringing court business to a stand still at both court sites in Lusaka. In one court alone 10 cases were adjourned because the defendants were not brought to court from the Remand Prison. See Report on Police Prosecution in Lusaka, *op cit*.

34 As seen in chapter 2, the Zambia Police were not originally raised to perform civil but military or para-military duties. Prosecution is seen by many police officers as particularly unsuitable for them. The idea of bringing all prosecution functions under the Attorney General would bring about professionalism, but the chronic staff shortage would bring more problems than it could solve. Besides, it could worsen the imbalance of resources as the vast majority of defendants are not represented. There would be a need simultaneously to strengthen the Legal Aid Department.

35 See Report Police Prosecution in Lusaka, *op cit*

36 One case, for instance, was withdrawn because the police had

failed to serve summonses on the witness, the management of the Inter-Continental Hotel, some 250 metres away from the court site. See Kaseka, 2P-249 (1986).

37 Some of these provisions, however, have been invoked on the courts' own initiative. On 8th. January, 1991, for instance, a Ndola magistrate (a town North of Lusaka) ordered the arrest of the Registrar of Companies and a Government Economist, both based in Lusaka. The two had failed to appear as witnesses in a theft case involving copper cathodes worth K486,536.00. The bench warrant for the arrest was issued after the prosecutor failed to explain the absence of the two witnesses. The prosecutor had first applied for an adjournment of the case in order to allow the two witnesses to travel from Lusaka. The magistrate refused the application to adjourn and stated: "...a bench warrant is the only alternative. This means that the two witnesses will be arrested by the police". The two witnesses had previously been warned for failure to appear. See The Times of Zambia, and The Daily Mail, 9th. January, 1991.

38 Clegg et al, op cit.

39 Misunderstandings, however, do arise leading to unintended consequences as the following case of an interviewed offender illustrates:

"Whilst I was in police remand, the complainant, whom I knew, came to see me. We discussed the case and agreed that I give him the K1,500.00. which I had taken (stolen) from him and that he should withdraw the case. The following day, I was taken to court. The prosecutor forgot to tell the court that the complainant wished to withdraw the case. I pleaded guilty to the charge (theft) in order to make things easier. I was convicted and immediately sentenced to 2 years imprisonment with hard labour. Outside the court room, the complainant told me that he now needed his money back. The prosecutor told him that it was too late and he should forget about his money as I was now convicted and I was to go to prison. The complainant was so shocked by this unexpected turn of events that he wept". Katiba, (Theft) interviewed on 9th. August, 1989.

40 Before magistrate Mrs. R.Samakayi, 6th. January, 1988. See Report on Police Prosecution in Lusaka, op cit.

41 See, for instance, Fungulani, 3P-26 (1987).

42 Shabwacha, SP-23 (1989).

43 Phiri, 3PB-260 (1989).

44 3P-439 (1986).

45 See, for instance, Mulenga, SP-273 (1986) and Katongo, 1PB-9 (1988).

46 3P-535 (1986), see also Mwanza, SP-104 (1984).

47 Malama, 2P-33 (1987).

48 Chanda, 3PB-51 (1986).

49 3PB-179 (1988).

50 See, for instance, Munjanja and Mwanza, SPB-67 (1988).

51 Zulu, 2P2-341 (1989).

52 Banda, SP-175 (1988).

53 SPB-104 (1988).

54 See, for instance, Mongo, 3P2-84 (1988).

55 SP-79 (1988), see also Banda, 2P2-9 (1988).

56 See, for instance, Chikuya, 3PB-87 (1989).

57 See Mweemba and Others, SP-277 (1986), and also Lukamba, SP-6 (1989).

58 SP-102 (1987).

59 See, for instance, Bwali, 2P2 624 (1988).

60 See, for instance, Kabwe, 3PB-25 (1987).

61 Tembo, 3PB-74 (1989).

62 3P-426 (1986).

63 3PB-11 (1989).

64 Zulu, 1PB-119 (1988). The procedure of giving evidence by letter exists, but it was not invoked in this case.

65 Mbewe and Banda, 3P-225 (1985) and Mwansa, PB-248 (1986).

66 Section 113 of the Penal code, Cap 146 of the Laws of Zambia states:
 113(1) "Any person who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal a felony, or will abstain from, discontinue or delay a prosecution for a felony, or will withhold any evidence thereof, is guilty of a misdemeanour".
 113(2) "Any person who gives, offers, promises, agrees or attempts to give any property or benefit of any kind for himself or another to any person upon an agreement or understanding that such a person will compound or conceal a felony, or will abstain from, discontinue or delay a prosecution for a felony or withhold any evidence thereof, is guilty of a misdemeanour".

67 See Clegg et al, op cit, 14.

68 A.Allott, op cit, 35.

69 At a magistrates' seminar held in Lusaka in August 1987, one of the resolutions passed was that nolle prosequi should be amended in a way that would allow courts to question it.

70 SP-81 (1986). On 7th. August, 1990, a judge sitting in the Ndola High Court heard that case records for seven defendants charged with aggravated robbery and burglary had gone missing. The judge discharged 4 of the defendants after a nolle prosequi was entered following a refusal of an application for adjournment of the case.

71 Changwe, 3P-598 (1985).

72 Katubile, 16 PB-46 (1989), see also Chongo, 3PB-80 (1986).

73 Muchanga, SP-108 (1985).

74 2P2-55 (1984).

75 See, for instance, Phiri, 3P-190 (1985).

76 SPB-13 (1988).

77 2P-64 (1986), see also Chansa, 3PB-276 (1989).

78 SSP-92 (1986), see also Kunda and Bweupe, SSP-29 (1985), Daka, Tuzama and Phiri, SSP-33 (1985).

79 SSP-77 (1985). It seems that there is no specific section in the C.P.C. upon which the magistrate based his action in this case.

80 See M.Zander, "Acquittal Rates and Not Guilty Pleas: What do the Statistics Mean? [1974] Crim.L.R. 401, 406.

81 In cases where the defendant was legally represented, the case record usually gave some indication of that, particularly at the sentencing stage when the magistrate summarised mitigatory remarks. See for instance, Sakala. A 2PB-28 (1987), a case in which a 31 year old soldier was convicted of theft by public servants involving 95 rounds of ammunition valued at K139.00. Before sentencing him to 18 months imprisonment, the magistrate remarked: "...counsel says that the accused person is a first offender who has had 10 years of loyal service in the Army...".

Twenty-one of the 34 defendants who had legal representation were convicted of theft by public servants.

82 The case came before magistrate Mr. M.Kalima on 16th. December, 1988. The writer was not able to see the outcome of the case, but there was a strong hint that the case had little chance of success. It was the view amongst many magistrates that

a high number of stock theft cases collapsed for this reason. See Report on Police Prosecution in Lusaka, op cit.

83 The study referred to above, ibid, sponsored by the Ministry of Home Affairs, and in which the writer played a major part, was prompted by the official view that there were too many acquittals in the magistrates' courts in Lusaka. Due to the official insistence, "too many acquittals" became the focus of the study.

84 See M.Zander, op cit, 1974, 404.

85 See A.A.Ayedemi, "Contest Ratio of Criminal Cases", in A.A.Ayedemi (ed), op cit, 212. The method used in the present study to calculate the acquittal rate is the one used by Professor Zander. Comparison with the Nigerian study is made difficult by the fact that Ayedemi does not spell out the method he used to calculate the acquittal rate.

86 As regards procedure and practice in the High court of Zambia, section 260 of the C.P.C. provides that:
"The practice of the High Court in its criminal jurisdiction, shall be assimilated, as clearly as circumstances will permit, to the practice of Her Britannic Majesty's High Court of Justice in its criminal jurisdiction and of Oyer and Terminet and General Goal Delivery in England".

87 As seen in chapters 2 and 4, 97% of defendants in this study were not represented.

88 It is of interest that while significant changes have taken place in such areas as land law and succession Land (Conversion of Titles) Act 1975, and in industrial relations (Industrial Relations Act) etc, no such changes have occurred in the area of criminal law and procedure (except changes designed to increase the severity of penalties, mostly for property offences or to widen the scope of certain offences such as treason and sedition). The reason for this negative trend in criminal law lies partly in the deep inequalities within the Zambian society. Most subjects of the criminal process are poor people (probably true of other societies), without any significant political voice to influence positive change. On the other hand, the victims of crime, mostly the policy makers, have ensured tough penalties for offences such as theft of a motor-vehicle.

89 D.N.Smith, "Man and Law in Africa: A Role for Customary Courts in the Urbanization Process" The American Journal of Comparative Law, Vol.XX, No. 2, 236 (1972).

90 Ibid, 236.

91 A.Paliwala, "Law and Order in the Village: Papua New Guinea's Village Courts", in C.Sumner (ed), op cit, 196. See also E.V.Mittlebeeler, op cit, 194.

92 F.Du Bow, Justice for People: Law and Politics in the Lower

Courts of Tanzania, Ph.D Thesis, University of Michigan, 1973,
and O.O.Olubuntimehin, "The Difference Between Real and Apparent
Criminality", in A.A.Ayedemi (ed), op cit, 3-8.

**TABLE 23 JUDGMENT AGAINST OFFENCE CATEGORY FOR ALL DEFENDANTS
IN THE SAMPLE (Case Records).**

		Judgment									
		1		2		3		4			
		No	%	No	%	No	%	No	%	ALL	%
C	0	5	17	1	4	23	79	-	0	29	100
h	1	54	52	7	7	40	38	3	3	104	100
a	2	174	51	38	11	125	36	6	2	343	100
r	3	32	40	28	35	19	24	1	1	80	100
g	4	9	21	12	29	21	50	-	-	42	100
e	5	56	67	9	11	18	22	-	-	83	100
	6	123	48	15	6	112	44	4	2	254	100
	7	79	54	7	5	59	40	2	1	147	100
	8	6	13	-	-	40	85	1	2	47	100
ALL		538	48	117	10	457	40	17	2	1129	100

Key:

Charge

Theft of a Motor-vehicle.....	0
Theft from the Person.....	1
Theft by Servants.....	2
Theft by Public Servants.....	3
Stock Theft.....	4
Theft from a Motor-vehicle.....	5
Burglary.....	6
House Breaking.....	7
Robbery.....	8

Judgment

Convicted.....	1
Acquitted.....	2
Withdrawn.....	3
Dismissed.....	4

TABLE 24 REASONS FOR WITHDRAWAL OF CASES UNDER SECTION 88(a)
OF THE CRIMINAL PROCEDURE CODE (C.P.C) (Case Records)

Reason	Cases		Defendants	
	No.	%	No.	%
Non-appearance of witnesses	62	34.6	95	34.9
Failure of the complainant to turn up and give evidence	59	33.0	87	32.0
Need to re-draft the charge	16	8.9	33	12.1
Need to investigate the case further	8	4.5	10	3.7
Failure by the police to bring the defendant to court from the Remand Prison or from the Police Station or failure to execute arrest warrants	19	10.7	28	10.4
Arresting officer not present in court	7	3.9	9	3.3
Death or serious illness of the defendant or arresting officer	4	2.2	6	2.2
Docket cannot be found	2	1.1	2	0.7
No reason stated	2	1.1	2	0.7
Total	179	100.0	272	100.0

TABLE 25 REASONS FOR WITHDRAWAL OF CASES UNDER SECTION 201 OF THE CRIMINAL PROCEDURE CODE (C.P.C) (Case Records).

Reason	Cases		Defendants	
	No.	%	No.	%
Humanitarian considerations	26	20.1	33	19.2
Defendant was a good servant and the complainant/employer wanted to deal with the matter administratively	17	13.2	24	14.0
Complainant related to or friend of the defendant	27	20.9	34	19.8
Complainant and defendant lived in the same neighbourhood	12	9.3	18	10.4
Defendant agreed to compensate complainant	9	7.0	16	9.3
Stolen property recovered	13	10.1	16	9.3
Lack of interest in the matter on the part of the complainant	12	9.3	15	8.7
No reason stated	13	10.1	16	9.3
Total	129	100.0	172	100.0

TABLE 26 REASONS FOR ACQUITTAL OF THE 117 DEFENDANTS (Case Records)

Reason	Cases		Defendants	
	No.	%	No	%
Failure by the prosecution to prove the case beyond behond reasonable doubt	41	64.1	47	40.2
Failure by the prosecution to adduce evidence that would establish a <u>prima facie</u> case against the defendant	13	20.3	36	30.8
Police offered no evidence against the defendant	10	15.6	34	29.0
Total	64	100.0	117	100.0

TABLE 27 ACQUITTAL RATE PER OFFENCE CATEGORY. (Case Records).

		Plea				Acquittal
		0	1	2	ALL	Rate (%)
C	0	0	3	2	5	50.0
h	1	0	21	33	54	15.2
a	2	0	106	68	174	17.6
r	3	0	16	16	32	85.5
g	4	0	3	6	9	83.3
e	5	0	30	26	56	7.7
	6	0	72	51	123	7.8
	7	1	56	22	79	18.2
	8	0	1	5	6	-
ALL		1	308	229	538	20.5

Key:

Charge

Theft of a Motor-vehicle.....	0
Theft from the Person.....	1
Theft by Servants.....	2
Theft by Public Servants.....	3
Stock Theft.....	4
Theft fom a Motor-vehicle.....	5
Burglary.....	6
House Breaking.....	7
Robbery.....	8

Plea

Not Stated on the Case Record.....	0
Guilty.....	1
Not Guilty.....	2

CHAPTER 6

SENTENCING : IMPRISONMENT.

Table 28 shows the distribution of sentences which were imposed on the 538 defendants who were convicted out of the total of 1129 defendants whose case records were examined in this study. It also shows that 354 of the convicted defendants were sentenced to imprisonment and that a total of 184 defendants were given various non-custodial sentences. This chapter discusses imprisonment and the next chapter looks at non-custodial measures. Since these two chapters are closely related, the conclusion which appears at the end of chapter 7 covers both of them.

Before we discuss the principles of sentencing magistrates followed in the cases examined in this study, it may be necessary to mention that information available on those principles is limited. The reason for this is that, as a general rule, Zambian sentencers are not required to state reasons for the sentence imposed. This was the ruling in Katongo V The People¹. In that case the accused was sentenced to 12 months imprisonment and 8 strokes of a cane for indecent assault by the High Court upon his committal for sentence. He appealed against sentence on the ground that in sentencing him, the judge did not give reasons for his sentence. His advocate argued that reasons for sentence should be given: as a matter of natural justice, as a way to achieve rationality and consistency of sentence and as a way to give the accused person the opportunity to exercise his right to challenge the sentence. The Court of Appeal rejected that

argument and held:

"In the ordinary case there is no reason for the trial judge to set out his reasons for imposing a particular sentence... Sentence is a matter of discretion, within, of course, any statutory limits imposed in respect of the offence for which the accused person is convicted".².

6:1 The Effect of Mitigation on the Sentence.

The right of the accused person to address the court in mitigation of sentence was re-asserted in the 1956 case of ³Chinayi V R. In that case, the accused person was convicted of theft. The magistrate failed to permit his counsel to address the court in mitigation of sentence. Chief Justice Murray held that:

"Though there may be no statutory provision entitling an accused person to address the court in mitigation of sentence before the court passes sentence, the practice is that such an opportunity is usually given. The court's refusal, or failure to give the accused that opportunity, though not constituting an irregularity affecting the propriety of the conviction, may necessitate a re-assessment of the sentence, either by the trial court or remittal for the purpose or in an exceptional case, by the Court of Appeal itself".

The term "mitigating factors" refers to:

"matters such as the character and history of the offender, the pressures which led to the commission of the offence and the consequences of conviction and the sentence on the offender".⁴.

Under this section we examine what the offenders pleaded in mitigation and the courts' reaction to their pleas as recorded by magistrates on the case records. An analysis of case records revealed the following mitigating factors as presented by offenders: plight of the family of the offender, loss of education, employment or career and illness. The age of the offender as a mitigating factor is also considered. We now examine each of these factors.

6:1 (a) Plight of the Family and Dependants of the Offender.

Table 29 shows that the substantial number of the imprisoned offenders, representing 143 or 40% raised the plight of their families which would result if they were sent to prison. Plight of the family of the offender meant the lack of financial⁵ as well as emotional support from the offender. It also included illness of a close member of the offender's family such as his wife or child. It meant that imprisonment of the offender at that critical time would worsen the situation. But despite the "popularity" of this "mitigating" plea among offenders, the Appeal Courts (i.e the High Court and the Supreme Court) have held that it should not be considered for two reasons. Firstly, hardship to one's family is a natural and inevitable risk of indulging in criminal activities. Secondly, offenders should have thought of such consequences to their families before they⁶ engaged in criminal activities.

Magistrates seem to have applied this principle consistently in the cases studied. Thus in one case, a 25 year old security guard pleaded guilty to theft of 91 tablets of soap valued at K61.35. In mitigation, he told the court: "I am looking after my widowed mother and 4 sisters and brothers". In reply the magistrate said:

"The accused's family is not a mitigating factor as the accused should have thought of his family before committing the offence".

The defendant was sentenced to 9 months imprisonment with hard⁷ labour. In another case, a 26 year old man, pleaded guilty to theft from a motor-vehicle involving 5 litres of cooking oil

valued at K50.00. In mitigation, he told the magistrate that his wife was seriously physically handicapped and in addition, she had a 3 month old baby. In sentencing him to 6 months imprisonment, the magistrate dismissed the mitigation by saying: "The accused should have considered his lame wife before
8
committing the offence".

Even where female offenders were concerned, the plight of their children did not in all cases prevent their imprisonment. Of the 354 imprisoned offenders whose case records were studied, only
9
3 were females. One of the 3 females was a house-wife aged 26 years and she was convicted of burglary to which she pleaded guilty. The property involved consisted of clothes and bedding valued at K1,712.00. The other two females aged 25 and 29 years respectively, were jointly convicted of theft by servants to which they pleaded not guilty. They stole K2,235.20 cash from their employer for whom they worked as cashiers. All the three females talked about the plight of their children in mitigation of sentence as there was nobody to look after them. In the case of the female convicted of burglary, she was sentenced to 18 months imprisonment, the magistrate commenting: " ..it was unusual for a woman to commit such an offence" and the sentence was meant to be "an example to other women who might behave in a similar way". The other two females were each sentenced to 9 months imprisonment but without any comment made or recorded on the case record.

6:1 (b) Loss of Employment, Education or Career.

Magistrates seem to have taken the view that loss of employment

or school place should not affect the sentence because as is the case with the plight of the offender's family, the offender should have thought about it before committing the offence. Thus in one case, a 32 year old checker pleaded guilty to house breaking and theft involving 5 magazines, 7 curtains, 2 plastic table cloths and one pillow case, all valued at K1,367.00. In mitigation of sentence, he told the court that a prison sentence would mean loss of employment for him. Sentencing him to 12 months imprisonment, the magistrate said that the offender "should have thought that he would lose employment upon conviction"¹⁰. Similarly, a 20 year old school boy pleaded not guilty to burglary and theft involving bedding, clothes and plates, all valued at K762.00. In mitigation of sentence, he told the magistrate that he was attending school. Sentencing him to 18 months, the magistrate said: "You should have thought about your school before committing the offence"¹¹.

The wholesale rejection of the loss of employment or career as a mitigating factor creates injustice in some cases. Generally, taking into account the offender's loss of employment in sentencing would undoubtedly create a double standard when dealing with the unemployed offenders, who, as seen in chapter 3, constituted around 41% of the offenders in this study. It has been pointed out by other writers that loss of employment as a mitigating factor loses much of its meaning for offenders convicted of theft by servants and by public servants. For this group of offenders, loss of employment is a natural consequence of the commission of the offence."¹²

On the other hand, there is some merit in the argument that the criminal record that the offender has now acquired following his conviction together with all its consequences, such as loss of employment, should be considered. This is practised in some countries. In one Canadian case, for instance, it was held that the likelihood that the accused person would upon conviction be discharged from the Air Force was a factor which should temper¹³ the severity of the punishment that otherwise might be imposed. In addition, the definition of "mitigating factors" already seen above, includes the consequences of conviction and sentence on the offender.

6:1 (c) The Age of the Offender.

In other jurisdictions the youth of the offender is a recognised mitigating factor in sentencing. According to Thomas, the youth of the offender is a mitigating factor for offenders in early 20s. The age of the offender may be significant even for offenders in the 30s, but its importance declines progressively. At the other end of the scale, age begins to be a factor once the offender has passed 60 years, especially when it is raised in¹⁴ addition to other factors such as good character. It may be argued, however, that a long sentence passed on a man aged 60 years or more may be considered appropriate so as to mark society's disapproval of his conduct.

In Zambia separate legislation, the Juveniles Act (Cap 217), governs the sentencing of as well as other matters related to the¹⁵ treatment of juvenile offenders. By the provisions of the Act, a juvenile (i.e, one between 8 and 19 years) may not be

imprisoned unless the court is of the view that there is no
other suitable way of dealing with him.¹⁶

The Supreme Court has held that as far as possible juveniles should not be sent to prison even for offences that require minimum sentences.¹⁷ Instead of prison juvenile offenders should be sent to a reformatory school, but then only after other measures¹⁸ have proved ineffective. In other circumstances, non-custodial measures,¹⁹ such as probation, should be ordered.

In this study, 44 or 12% of the 354 imprisoned offenders whose case records were studied, were juveniles as Table 30 shows. In the case of the interviewed offenders, 10% were juveniles. In both samples, the majority of juveniles were convicted of theft, house breaking and burglary.

From the case records it appears that the need to "correct" the young offender before he turned into a hardened criminal, the prevalence and seriousness of the offence, and the need for deterrence were the factors which might have influenced the magistrates to imprison juvenile offenders. In one case an 18 year old unemployed youth pleaded guilty to theft of a jack worth K250.00 from a motor-vehicle. In sentencing him to 18 months imprisonment, the magistrate said:

"...the accused is still a young man, if he starts committing offences of this nature, he will lead a miserable life. Theft from a motor-vehicle is a prevalent offence and the only way we can help is by imposing a deterrent sentence".²⁰

In sentencing another 18 year old juvenile to 3 years imprisonment for burglary involving clothes valued at K1,680.00

to which he pleaded not guilty, the magistrate stated: "This is a very serious offence. I will be failing in my duty if I do not send you to prison. I have a duty to impose a deterrent sentence".²¹

At the other end of the scale, we had only 4 offenders who were aged 60 years and above. Two of them were convicted of stock theft and were sentenced to the mandatory sentence of 5 years imprisonment. These two offenders will be discussed in detail in the section on minimum sentencing later in this chapter. The third offender was among a group of 4 people who were jointly convicted of theft from a motor-vehicle and were all sentenced to 9 months imprisonment. His case is discussed fully under the section on joint offenders in this chapter. The fourth offender was aged 60 years and was convicted of theft by servants to which he pleaded guilty. Property involved consisted of 2 boxes of tomatoes and two boxes of apples all valued at K255.00. In mitigation he said: "I have two children . I stole because I did not have mealie meal at home. It is hunger which forced me to steal". In sentencing him to 12 months imprisonment the magistrate did not make any reference to his age but instead, he castigated the offender for having resorted to stealing just because he was hungry and advised him in future to seek permission of the owner of property.

As already seen above, age is a mitigation in jurisdictions such as England. In Lusaka magistrates' courts , evidence on the extent to which age is a mitigation is inconclusive. As will be seen further (chapter 7 and Table 30), a higher proportion of

juveniles than adult offenders were given non-custodial sentences. This was not necessarily because age is a mitigation, but because the law (the Juveniles Act) compels magistrates to do so.

6:1 (d) Illness.

22

The Supreme Court has held in Zulu V The People that courts should not ordinarily arrive at a sentence solely on the basis of the ill-health of the offender. There may be exceptional cases, however, in which the court may exercise leniency because of the exceptional results which may ensue from a prison sentence by reason of the offender's illness. In the circumstances where health is to be taken into account there must be adequate medical evidence either oral or written.

Illness was pleaded as mitigation by 33 or 9% of the 354 imprisoned offenders whose case records were studied. Various types of illness were mentioned: Tuberculosis (TB), venereal disease (VD), ulcers, mental illness and physical disability.

In none of the cases in which the illness of the offender was raised in mitigation did magistrates make specific reference to it in their sentencing remarks. Thus in one of the cases a 48 year old house servant pleaded not guilty to theft by servants involving chickens worth K2,305.00. In mitigation, he told the court that he suffered from mental illness, had sores on his body and bled in his ears. Without any reference to the statement in mitigation, the magistrate sentenced him to 12 months imprisonment on grounds of the prevalence and seriousness of the

offence. But the fact that it was not mentioned does not necessarily mean that illness was not taken into account. On the other hand, the sentence of 12 months imprisonment was on the higher side in this case, considering that the average sentence for theft by servants in this study was 9 months (see Table 34).

In other words, the sentence of 12 months appears to have been more appropriate for healthy adults of the offender's age group.

It would appear that the illness of the offender when pleaded in mitigation is generally not taken into account. This seems contrary to the spirit of the Zulu case referred to above. There was no record in any of the cases in this study as to whether or not the court had asked the offender to produce evidence in support of the alleged illness. It is implicit in the decision of the Zulu case that the court should allow the offender to produce such evidence either orally or in writing and not to dismiss such mitigation off-hand as seems to have been the case in this study.

6:1 (e) Plea for Mercy.

Most of the 90 or 25.4% of the 354 imprisoned offenders who pleaded for mercy in mitigation had pleaded guilty. In the majority of those cases, the offender simply said: "I am sorry" or "I ask for forgiveness" or "I did not know what I was doing", or all the three statements. It may be difficult to disentangle the plea of guilty from the pleas for mercy. But as it will be shown in another section of this chapter, the plea of guilty did not seem to have been taken into account in

fixing the length of sentence.

Under normal circumstances, a plea for mercy could imply genuine contrition on the part of the offender who pleaded guilty and that could earn him a reasonable "discount" in sentence. But that was not the case in the majority of cases. Thus in one case a 21 year old shop keeper pleaded guilty to burglary involving toiletries worth K73.00. In mitigation, he said: "I am sorry". Sentencing him to 2 years imprisonment the magistrate remarked²⁴ that cases of this nature were prevalent. In another case, a 20 year old "garden boy" pleaded guilty to theft from a motor-vehicle involving a radio cassette valued at K1,000.00. In mitigation, he said: "I am sorry for what I did, I ask for leniency". He was sentenced to 2 years imprisonment, the magistrate remarking that: "The accused is a first offender and²⁵ he deserves leniency". It may be said that it was the fact that he was a first offender rather than his plea for mercy that secured him a "lenient" sentence. But as further evidence will show later in this chapter, all the offenders magistrates dealt with in this study, except one, were "first offenders" because the mechanism for ascertaining previous convictions is inadequate.

More interesting cases were those in which the offenders pleaded not guilty, but in mitigation pleaded for mercy, thus admitting the offence by implication. One would have expected most of those offenders to have lost all claim to leniency on account of possible perjury especially if they testified under oath. But that was not the general case. In one case, for instance, a 19

year old house servant pleaded not guilty to theft by servants involving clothes worth K2,600.00. In mitigation he said: "I ask for the court's leniency. I did not know what I was doing. I will never repeat it". He was sentenced to 6 months imprisonment. Other offenders who pleaded not guilty but impliedly admitted their offences in mitigation were sentenced to much longer terms. For instance, a 23 year old unemployed man pleaded not guilty to theft from a motor-vehicle involving a hand bag containing assorted medicines, all valued at K3,000.00, was sentenced to 3 years imprisonment and no reasons were given for the sentence. In mitigation he said: "I am asking for leniency".

The evidence on the effect of the plea for mercy on sentence is inconclusive because the practice in magistrates' courts in Lusaka does not show a consistent pattern. The extent to which it is considered in fixing the sentence length cannot be ascertained with any degree of accuracy.

6:1 (f) Other Factors..

It is necessary here to mention two other factors which might have been considered by the magistrates. These factors are the extent to which the offender benefitted materially from the crime and the value of stolen property, which are really not mitigatory.

A decision by the then Court of Appeal (now the Supreme Court) suggests that the fact that the offender did not benefit materially from the offence may not be mitigatory. The court's view is that the absence of such benefit cannot be attributed to

"any credible actions or motives on the part of the offender, but²⁹
to astuteness and energy on the part of the police".

From the case records it is not clear to what extent magistrates took into account the fact that the offender derived material benefit from his crime when passing sentence. In a few cases, however, magistrates did mention the fact that the property stolen had been recovered. Not a single offender mentioned recovery of property or the absence of material benefit from the crime in mitigation.

In one case a 19 year old unemployed man pleaded guilty to burglary involving bedding, clothes and a radio cassette all valued at K1,865.00. In passing a sentence of 10 months imprisonment, the magistrate mentioned the fact that property³⁰ worth K593.00 was recovered.

In another case a 26 year old cook pleaded guilty to house breaking involving one camera, one stereo system a sleeping bag and clothes all valued at K15,000.00. In passing a sentence of 18 months imprisonment, the magistrate said that he took into account the fact that half of the stolen property was recovered. The magistrate seemed to have weighed that factor against the other factor that property stolen was of "great value" and that³¹ probably justified the sentence of that length.

It may be said that the value of stolen property should be taken into account on the basis that the more one steals the more one should be punished because one causes the complainant greater³² harm and suffering. On the other hand, the value of stolen

property may be insignificant but circumstances of the offence may justify a long sentence. Thus theft of property of little value may be aggravated by the vulnerability of the victim.³³ In the case of theft by servants and by public servants it has been pointed out that a custodial sentence is necessitated not so much by the intrinsic value of the property involved as by the relationship of the offender to the victim,³⁴ as will be seen later in this chapter.

6:1 (g) Why Magistrates Seemed to Ignore Mitigating Factors.

It has been shown above that in the majority of cases magistrates tended to ignore individual factors raised in mitigation and proceeded to impose the full sentence justified by the facts and the circumstances of the case. In nearly all the cases where mitigating factors were presented by offenders, the magistrates did not even address those factors in their sentencing remarks. Instead, they mentioned factors such as the prevalence of the offence and the need for deterrence. In other words, magistrates confined themselves to stereo-typed statements concerning the seriousness and prevalence of the offence instead of addressing the particular circumstances of the case as well as the offender's individual characteristics that aggravated or mitigated the offence. It therefore seems that the need to prevent future offending is the justification for ignoring mitigating factors in sentencing.³⁵ Sentencing, therefore seems to have been aimed at the general deterrence, i.e, fitting the punishment to the crime rather than to the offender. But this approach does not address the needs of individual deterrence

which requires that magistrates take into account individual factors and impose a sentence that seeks to prevent recidivism.

The other possible reason for ignoring mitigation could be the belief held by some magistrates that offenders often lied in mitigation in the hope that they would get a lighter sentence. At least two cases pointing to this were encountered and may be mentioned here.

In one case a 25 year old unemployed man pleaded guilty to theft of household goods valued at K225.00. In mitigation, he told the court that he had just received a message to the effect that his wife had died. He went on to say that he was very worried about his children as there was no-body to look after them. The magistrate adjourned the case to another day in order to enable the prosecution to ascertain the truthfulness of the offender's story. On the day of the hearing the prosecutor told the court that enquiries made in Misisi Compound where the offender claimed his wife had died, revealed that the offender had never been married. In passing a sentence of 3 years imprisonment, the magistrate made it clear that he was not
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influenced by the offender's untruthful statement.

In another case, a 25 year old offender told the court in mitigation that he stole 13 chickens worth K1,300.00. from his employer because his mother had died in Mazabuka and he needed to raise money to travel to her funeral. In reply the magistrate told the accused person that he was telling lies because at the time of the plea, he said that he "wanted to eat the chickens".

He was sentenced to 18 months imprisonment.

Telling lies in mitigation may be rife but it could not justify such a widespread disregard of mitigating factors. It might have produced injustice in genuine cases especially those in which illness of the offender was raised. Mechanisms for verifying illness claims exist and it appears that there was no reason why magistrates could not hear evidence on the issue within the decision in the Zulu case.

The right of the accused person to address the court in mitigation of sentence, which is grounded in the common law, has been adopted and fully entrenched in the Zambian criminal justice system, as already seen above. One of the chief merits of this right is that it ensures that "the court does not in sentencing³⁸ overlook any factors in the defendant's favour". In the magistrate's courts in Lusaka, this principle is not generally adhered to because magistrates tend to ignore individual factors as they pursue the general deterrent policy of making the punishment fit the offence rather than the offender (or both).

The plea in mitigation is itself poorly presented because the substantial majority of offenders, as seen in chapter 2, are not represented by counsel. The absence of social inquiry reports both for adult offenders and (except in rare cases) for juveniles compounds the problem. This puts a very heavy burden on inarticulate and ignorant offenders, who, as seen in chapter 3, constituted a significant proportion of the sample of offenders. Thus nearly all mitigating statements were restricted to stereo-

typed statements relating to the consequences of the offender's imprisonment on his family, particularly the loss of financial support.

Statements in mitigation of sentence should highlight factors such as the offenders' stable family life and their contribution to life in their communities, if any, particularly, a career in the civil or military service. On the other hand, if the offender's background reveals an unstable family life, that should be used as a basis for a plea for a non-custodial order such as probation or Extra Mural Penal Employment (E.M.P.E) or a suspended sentence in order to give the offender the responsibility that he has not been able to exercise before. Similarly, offenders with skills such as building and road maintenance, for instance, could emphasise these in mitigation as a basis for a plea for the E.M.P.E order. If the property stolen has been recovered and returned to the owner, that fact could also be highlighted in mitigation as being a form of restitution which should be taken into account in arriving at a sentence. This could bring flexibility to the current rigid regime of sentencing as it would provide a wider factual base within which a reasoned sentence could be arrived at.

6:2 The Effect of Plea on Sentence.

The Supreme Court has held that a plea of guilty must be taken into account in considering a sentence unless there are circumstances such as a man being caught red-handed in which case he has no alternative. Failure to take into account a plea of
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guilty is an error in principle.

The plea of guilty must be unequivocal and the procedure for accepting it was spelt out in the (then) Nyasaland case of R V Wandasi and approved by the then (Zambian) Court of Appeal in the case of The People V Zulu. In Wandasi, it was held that before accepting a plea of guilty, magistrates must satisfy themselves that the accused person admits each and every ingredient of the offence. Consequently, the answer "I admit" from the accused person must be elaborated. It is the duty of the magistrate to put questions to the accused person, particularly if he is not represented by counsel in order to satisfy himself that the accused understands and admits all the ingredients of the offence.
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There are two main reasons for the reduction of sentence or for allowing a discount following a plea of guilty. Firstly, the offender has not sought to avoid the consequences of his offence by maintaining a plea of not guilty. Secondly, he has saved the court's and the investigator's time as well public funds. In addition, by pleading guilty, the offender saves the witness the inconvenience and sometimes the pain of giving evidence. It has been argued therefore that a plea of guilty does not serve to punish a man more severely for pleading not guilty, but that it serves to reward somebody who has been honest enough to admit his wrong doing.
41 42
In the case of The People V Simolu, it was held that offenders who plead not guilty should not be punished for insisting on their constitutional right to trial.

The difficult question for a sentencer is to decide what length of sentence would have been appropriate in the absence of the

plea of guilty and what length is appropriate having regard to⁴³
the plea of guilty. In Mwiba V The People, the then Court of
Appeal reduced a sentence from 2 years to 18 months imprisonment
for theft by public servants because the magistrate did not take
into account the plea of guilty as well as the offenders's 7
years service in the Post Office. In another case, a sentence of
3 years imprisonment was reduced to 2 years and half for failure⁴⁴
by the magistrate to take the plea of guilty into account. From
the decided cases, it would appear that a quarter or a fifth of⁴⁵
the "full sentence" is the established discount.

This study found that 188 or 53% of the 354 imprisoned offenders
pleaded guilty and 166 or 43% pleaded not guilty. A very
similar pattern emerged in relation to the 100 interviewed
offenders of whom 55% pleaded guilty and 45% pleaded not guilty.
Much higher not guilty pleas and guilty pleas have been reported
elsewhere. For instance, a study in Kenya found that not guilty
pleas for property offences in Nairobi ranged from 83.6% for⁴⁶
theft to 92.4% for serious offences such as burglary and robbery.
The high rate of not guilty pleas inevitably puts a heavy burden
on the criminal process in Kenya. On the other hand, guilty
pleas, comprise 90% of convictions in the United States of⁴⁷
America. The reason for the high rate of guilty pleas in the
United States is the existence of plea bargaining which does not
exist in Lusaka and indeed in Zambia as a whole. In the United
Kingdom, in the 1970s the not guilty pleas for indictable
offences at the Old Bailey and the Inner London Crown Court had
been 60%. In the 1980s the rate of not guilty pleas rose from

62% in 1982 to 72% in 1989.

Although the pattern does not look systematic and consistent, it would appear from Table 31 that most of those convicted of more serious offences (seriousness determined by the sentence specified by legislators for the offence and the sentence range as determined by magistrates) tended to plead not guilty than those convicted of less serious offences. Thus 33 or 61% of the 54 offenders convicted of theft from the person pleaded not guilty and only 21 or 39% pleaded guilty. It will be shown later in this chapter in the section on the overall sentence length that magistrates sentenced theft offenders more severely than those convicted of theft by public servants. Similarly, 6 of the 9 offenders convicted of stock theft (punishable by a 5 year minimum sentence) pleaded not guilty. In the case of robbery, only one of the 5 offenders pleaded guilty. Among the interviewed offenders, 60% of those convicted of burglary and all the offenders convicted of aggravated robbery pleaded not guilty. It seems therefore that there was a relationship between the plea of not guilty and the perceived sentence severity.

When the type of plea is examined in relation to the sentence imposed it appears that the plea tendered was considered in making the initial decision as to whether to impose a prison sentence or a non-custodial order. Thus Table 32 shows that of the 354 offenders sentenced to prison terms, 188 or 53% pleaded guilty. On the other hand, out of a total of 109 offenders in whose respect a non-custodial order was made (excluding suspended

sentence), 80 or 73% pleaded guilty.

An interesting pattern emerges when the plea tendered is examined in the light of the sentence length as Table 33 shows. Table 33 does not show any clear evidence that offenders who pleaded guilty had any discount. In other words, they were not sentenced to shorter sentences than those who pleaded not guilty. Of the 188 offenders who pleaded guilty, 61 or 32% were sentenced to prison terms ranging from 15 days to 10 months. On the other hand, 62 or 37% of the 166 who pleaded not guilty were in the same sentence length range. The sentence length of between 12 to 30 months covered 97 or 52% of the 188 offenders who pleaded guilty and 80 or 48% of the 166 offenders who pleaded not guilty.

The longest sentence category of between 36 to 84 months covered 30 or 16% of the 188 offenders who pleaded guilty and 24 or 14% of the 166 offenders who pleaded not guilty.

The same pattern is obtained when individual offence categories are examined. For instance, in the case of burglary, 48 of the 86 offenders pleaded guilty while 38 pleaded not guilty. The sentence length of between 6 to 10 months contained 9 or 19% of the 48 offenders who pleaded guilty and 15 or 38% of the 38 offenders who pleaded not guilty. The next sentence category of between 12 to 30 months contained 25 or 52% of the 48 offenders who pleaded guilty and 18 or 47% of the 38 offenders who pleaded not guilty. The last sentence category of between 36 to 60 months covered 14 or 29% of the 48 offenders who pleaded guilty and 5 or 13% of the 38 offenders who pleaded not guilty.

Evidence from interviews with offenders largely confirms that from case records. Thus in the case of theft, the sentence range for offenders who pleaded guilty was from 3 months to 3 years while that for those who pleaded not guilty was 9 months to 2 years. Similarly, in the case of house breaking, the sentence range for the offenders who pleaded guilty was from 6 months to 5 years while that for those who pleaded not guilty was from 18 months to 4 years. A slightly different pattern emerged in the case of burglary. The sentence range for offenders who pleaded guilty was from 9 months to 3 years while that for those who pleaded not guilty was from 6 months to 5 years. But the general pattern is that there was no discount for pleading guilty and in some cases the range of sentence for those who pleaded guilty tended to be longer than those who pleaded not guilty.

Data from both samples of offenders show that little or no account was taken of the plea of guilty in fixing the sentence. In one English study, it was found that a plea of guilty was rarely cited as the reason for the sentence even though all offenders surveyed in the lower courts pleaded guilty. One reason for that, according to the writers was probably that the lay judiciary did not consider an admission of guilty as a mitigating factor. Reasons why magistrates in Lusaka did not give discount for the plea of guilty are not clear. An examination of the Supreme Court cases, some magisterial pronouncements as well as the reasons advanced by the offenders for pleading guilty may throw some light on this matter.

As already seen above it has been held that there cannot be a

reduction in sentence if the accused person had no alternative to the plea of guilty such as where he had been caught red-⁵⁰ handed. On the other hand, it has been pointed out, particularly in England that that while sentencing, due regard should be given⁵¹ to an accused person who pleads guilty and shows contrition. It appears that a plea of guilty alone may not in all cases produce an automatic reduction in sentence. The problem is how a magistrate will satisfy himself that there is genuine contrition in a particular case. It has been suggested that there may be genuine contrition where the offender owns up⁵² voluntarily and before he is arrested. In this study, none of the 55% of the offenders who were interviewed and who pleaded guilty surrendered voluntarily to the police before they were arrested. As has been indicated already, there was no evidence that they got lower sentences. On the other hand, only a few offenders, especially those working on farms, construction sites and in⁵³ factories were caught red-handed.

Magistrates in Lusaka seem to be of the view that the seriousness of the offence and the need for deterrence militate against the reduction of sentence following a guilty plea. In one case, for instance, a 30 year old fish-monger pleaded guilty to "burglary with intent to commit a felony of theft". In sentencing him to 18 months imprisonment, the magistrate said:

"This is a very serious offence and although the offender pleaded guilty and he is a first offender who deserves leniency, he has to be punished severely so that he fears to repeat the same".⁵⁴

The reasons for pleading guilty were wide and varied. Some of the

interviewed offenders claimed that they pleaded guilty because "the stolen goods were found on them" or "in the house of the accomplice", or because they "had committed the offence". Others pleaded guilty because, as was seen in chapter 4 they had already "confessed" under police interrogation and they saw no point in pleading other-wise.

A number of offenders who were convicted of more serious property offences such as house breaking, burglary and robbery pleaded guilty for different reasons. They pleaded guilty because they "did not want investigations which would have led to the recovery of stolen goods", or they "wanted the case to finish as quickly as possible" or because they "did not want their accomplice or accomplices who were at large to be arrested" (ie to protect gang members). It appeared that there was little or no expectation of a reduction in sentence on the part of the offenders for pleading guilty. In view of their correct perception it is surprising that so many offenders did plead guilty.

It may be necessary at this stage to examine the reasons which were advanced by the 45 interviewed offenders who pleaded not guilty. During one of the interviews with police officers, the writer was informed that offenders who were represented by⁵⁵ counsel pleaded not guilty as a result of advice from counsel. In this study, only 7 out of the 100 interviewed offenders had legal representation (see chapter 2) and they all pleaded not guilty, probably on the advice of counsel. Five of the 7 offenders were convicted of aggravated robbery in the High Court and were awaiting their appeal hearing in the Supreme Court at

the time of the interview. The other two were convicted of theft of a motor-vehicle and theft by public servants respectively.

A few of the 45 offenders pleaded not guilty because they "did not commit the offence" they were convicted of. The majority of them gave 3 reasons for the plea of not guilty all of which had something to do with police prosecution. These were that the offender thought that in the course of the trial, "the police⁵⁶ would withdraw the case" against them or that the "court would dismiss the case" for want of prosecution or that they "would be acquitted" at the end of the trial.

Perception of an acquittal or withdrawal of a case on the part of the offender as a reason for the plea of not guilty was confirmed⁵⁷ by the police officers interviewed in this study. It was also confirmed by the head of the police prosecution branch who added that: "Sometimes exhibits disappear from Police Stations or⁵⁸ witnesses are not traced resulting in the withdrawal of cases". As seen in chapter 5, a considerable number of cases were withdrawn because of lack of witnesses (see Table 24). Seven of the 9 magistrates whose views were sought on various aspects of the criminal process, agreed with the view that the anticipation of an acquittal or withdrawal was a major reason behind the plea of not guilty. Offenders displayed a remarkable awareness of the problems the prosecution faced and took advantage of those problems. This has serious implications for the efficiency of the prosecution as well as for the public confidence in this aspect of police work. In the long run, this weakens deterrence which as seen above and to be seen further in chapter 8, is the

judicial justification for imprisonment.

In some cases, however, magistrates may be the reason for a plea of not guilty in that they sometimes amend the plea from one of guilty to not guilty. According to police sources, that usually happens during the reading of facts when the magistrate discovers⁵⁹ some element of fact on which evidence is needed. Unfortunately, evidence gathered in this study did not throw light on this.

It has been shown in this section that a plea of guilty on its own did not in the majority of cases give rise to an automatic reduction in the sentence. It is submitted by the present writer that in the absence of any additional factors such as contrition or remorse on the part of the offender, there is no justification for awarding a lower sentence on the basis of the plea of guilty. Such an open policy may be abused. In addition, an automatic discount following a plea of guilty may pressurise an innocent person to plead guilty believing that a conviction after a full⁶⁰ trial may lead to a longer sentence.

A significant number of offenders in this study pleaded guilty for reasons other than the possible reduction of sentence. Most of them could not have been aware that such a possibility existed. But that of course, is hardly a reason for denying them discount. It also seems inconceivable that in all cases in which a plea of guilty was tendered there was no genuine contrition on the part of offenders which would have earned them a discount. It appears that because of the magistrate's pursuit of deterrent policy, they are denying discount to deserving cases, apparently

in disregard of the Appeal Courts' ruling on the matter. It is for the same reason that magistrates in their sentencing remarks, in the few cases in which they were made, no reference was made to the fact that the offender pleaded guilty. It will, however, be shown in the section on joint offenders in this chapter, that magistrates were more likely to distinguish the sentence between two co-offenders if they tendered different pleas.

6:3 First Offenders: Factors Justifying Their Imprisonment.

In Zambia, the term "first offender" does not necessarily mean someone with no previous conviction or convictions of any kind. A first offender means someone who has no previous conviction or convictions involving a similar group of offences to the one he stands convicted of.⁶¹ It therefore means that for the purpose of this study, a first offender is one who has no previous conviction for a property offence. This is similar to how the Tanzanian Minimum Sentences Act, 1965 defines first offenders,⁶² but the East African case of The Republic V Kapande,⁶³ provides a rather sweeping definition of a first offender.

The principle of showing leniency to first offenders has been firmly established in Zambian sentencing principles. The reason for treating first offenders leniently is that a lenient sentence⁶⁴ is sufficient to teach a previously honest person a lesson. In addition, the Supreme Court has held that:

"Where the legislature has prescribed a sentence of a fine or imprisonment, a first offender, where there are no aggravating circumstances, should be sentenced to pay a fine with imprisonment only in default".⁶⁵

As indicated in chapter 3, this study found that 55% of the

interviewed offenders were first offenders. Of the 354 imprisoned offenders whose case records were studied, records in relation to 275 or 77.7% of those offenders indicated that they were first offenders. In the case of 78 or 22% of the offenders, their case records did not indicate whether or not they were first offenders.⁶⁶ Only one offender was recorded as having a previous conviction.

Between 1968-1977, Hatchard found that first offenders accounted for between 50 and 55% of all the prison population (including non-property offenders) nation-wide.⁶⁷ The present study (as seen in chapter 3) found that between 1980-1986 first offenders accounted for between 53 and 63% of all the prison population (including non-property offenders) nation-wide. This may suggest that the courts have been more inclined since 1980 to sentencing first offenders to imprisonment. On the other hand, the figure for offenders with 3 or more previous convictions has continued to increase since 1984 as will be seen further in chapter 8. It is, however, evident from both the official records and from this study that first offenders constitute a significant proportion of imprisoned offenders.

It was held in the Longwe case already referred to above that⁶⁸ "certain aggravating factors" may prevent the order of a fine or indeed any other non-custodial sentence on a first offender. We now turn to the examination of what were the aggravating factors which necessitated the imprisonment of so many first offenders in this study.

6:3 (a) Breach of Trust.

It has been stated in England, for instance, that for offences involving a breach of trust, imprisonment is the usual penalty even for a first offender. The main reason for this is that the gravity of the offence (or the aggravating factor) lies in the actual breach of trust rather than in the profit obtained from the offence.⁶⁹ The Zambian bench seems to have adopted this approach.⁷⁰ Thus in Kalenga V The People, a 40 year old civil servant was imprisoned for 18 months in a magistrate's court for theft of K82.00 from the Government. The High Court increased the sentence to 24 months because the offence "involved a gross breach of trust".⁷¹ In another case, the judge observed that:

"...there is something particularly despicable about stealing from one's employer and such an offence is deserving of condign punishment".⁷²

This study tends to show that magistrates have been somewhat influenced by this principle. In one case, for instance, a 22 year old house servant stole K8,000.00 cash from his employer and pleaded guilty to the charge. He was a first offender and was sentenced to 2 years imprisonment. In imposing that sentence, the magistrate remarked:"...the accused made no effort to maintain the trust given him by his employer".⁷³

In some cases, the magistrates have described offenders who steal from their employers as "ungrateful".⁷⁴ Yet in other cases, they have interpreted the offender's behaviour as "biting the finger that feeds him"⁷⁵ and therefore deserving imprisonment.

6:3 (b) Seriousness and/or Prevalence of the Offence and the Consequent Need for Deterrence..

"Seriousness" of the offence may be interpreted in many ways. It may be interpreted in terms of the amount or the value of stolen property, or in terms of the severity of the sentence specified for the offence by the legislature. In addition, an otherwise less serious offence (on account of sentence or otherwise), may become serious by the mode of offending.

Property offences, being classified as "felonies" are in the category of serious offences. Thus it has been held that "burglary and theft are serious offences and require a deterrent⁷⁶ sentence". It was not therefore surprising that in this study, as will be seen further in chapter 8 (Table 44), the seriousness of the offence was one of the most frequently cited reasons for imprisonment, alone, or in combination with other reasons such as the prevalence of the offence or deterrence. In one of those cases, a 20 year old unemployed man pleaded guilty to theft from a motor-vehicle involving one radio cassette and one speaker, all valued at K10,500.00. Sentencing him to 18 months imprisonment, the magistrate remarked: "....this is a very serious offence which requires a custodial sentence even though you are a first⁷⁷ offender".

⁷⁸
In Kalenga V The People, already referred to above, it was held that: "Sentencers should take into account the frequency of or prevalence of an offence in the community as a factor tending to⁷⁹ support a severe sentence".

Prevalence of the offence was cited as a reason for the sentence

of imprisonment in a number of cases as will be seen further in chapter 8 (Table 44). In one case, for example, a 29 year old driver was convicted of house breaking to which he pleaded guilty. The property involved was clothes, and bedding, all valued at K1,470.00. Sentencing him to 3 years imprisonment, the magistrate remarked: "Cases of this nature are prevalent and the courts must impose long sentences". In another case, a 23 year old barman was convicted of theft by servants to which he pleaded guilty. He stole 58 crates of beer worth K5,094.65. Sentencing him to 15 months imprisonment, the magistrate said: "This is a very serious and prevalent offence in Lusaka and the accused person cannot escape a custodial sentence".

Magistrates in Lusaka simply assume that the particular offence is prevalent for they do not hear any statistical evidence to that effect. In any case official records are unreliable as seen in chapter 3. It means that magistrates' justification of a prison sentence on the ground that the offence is "prevalent" is not based on any firm statistical evidence. This justification therefore, provides a ground upon which an appeal against sentence can be based.

Deterrence is the most frequently cited reason for imposing a prison sentence. Since deterrence appears to be the policy of both the judiciary and the legislature on sentencing and it is therefore part of the crime prevention strategy, it is fully discussed in chapter 8. In that chapter, it will be shown statistically that the deterrence policy has not achieved its desired aim of crime prevention.

6:3 (c) Planning the Execution of the Offence.

It has been stated, in Britain, for instance that offences which exhibit organization, premeditation and planning attract⁸³ longer prison sentences. The main reason for this is that planned offending is deliberate and in which the offender⁸⁴ chooses his targets "calmly and calculatingly". In the case of⁸⁵ Jutronich V The People, a 4 year prison sentence imposed in the magistrates' court on 3 joint offenders for theft was upheld on appeal on the ground that:

"The offence comprised a criminal enterprise, planned and executed on a grand scale and therefore deserving the condign punishment which was imposed".⁸⁶

In the present study, 60% of the interviewed offenders carefully⁸⁷ planned their offences, as seen in chapter 3. In the 40% of the cases, offending took the form of a spontaneous reaction to a sudden opportunity either on the street or at the work place. Planning was more prevalent in the more serious offences of house breaking, burglary, robbery as well as in theft of a motor-⁸⁸ vehicle and stock theft.

Surprisingly, however, none of the case records specifically mentioned "planning" or "organization" as the justification for the sentence imposed. It can be argued, nevertheless, that the fact that neither of the two elements was mentioned does not mean that magistrates did not consider them aggravating factors wherever they were mentioned in the facts of the case. As already⁸⁹ mentioned above, Zambian sentencers are not required to state reasons for any sentence they impose.

This study as well as official records show that first offenders constitute the largest proportion of offenders. It is not a sound policy and practice to imprison large numbers of first offenders, especially in view of the poor facilities for segregation of offenders that exist in all Zambian prisons. An interesting aspect about the way magistrates deal with first offenders is that in nearly all cases in which sentencing remarks were made, magistrates acknowledged the fact that first offenders were entitled to leniency. The standard terminology in all cases is: "You are a first offender and therefore entitled to leniency...".⁹⁰ "Leniency" may be an elusive term and therefore difficult to define. But even though that may be the case, magistrates in Lusaka use that term so loosely that it has lost all meaning and purpose. Records do not show that first offenders are treated leniently, as evidenced by the sentence length to be seen in a later section in this chapter. There may be two reasons why magistrates speak of showing "leniency" to first offenders but do not actually show it. Firstly, it could be that magistrates do not in the majority of cases, owing to poor record keeping, believe that the particular offender before them is really a first offender as claimed by the prosecution. In other words magistrates are sceptical about the ability of the police to investigate the background of the offender, as will be seen in the next section in this chapter. Secondly, as is the case with the plea of guilty already seen in this chapter, it could mean that magistrates make those remarks because the Appeal Courts expect them to show leniency to first offenders. In either case, injustice is done in deserving cases.

6:4 Offenders With Previous Convictions

6:4 (a) Procedure For Proof of Previous Convictions.

The procedure for proof of previous convictions is spelt out in section 142 of the Criminal Procedure Code. It requires either a police officer having custody of the case record or the officer-in-charge of the prison in which punishment was served to produce a certificate signed by him to that effect. In the case of a prison officer-in-charge, production of a warrant of commitment to the prison may be sufficient proof of a previous conviction. In either case, evidence to link the identity of the accused person to the person whose proof of previous conviction is produced should also be adduced.

This procedure traces its origin from the English case of van
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Pelz, decided in 1943. The procedure was the subject of a judicial circular No.5 of 1962 in the then Northern Rhodesia. During the same year, i.e 1962, the procedure as contained in the Criminal Procedure Code was interpreted in the case of Kang'ombe
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V R in which it was held:

"A proof of evidence should be prepared by the police officer, containing as far as known a factual statement of the previous convictions, date of birth, education and employment of the convict and if he has been previously imprisoned, the date of his last discharge from prison. It may also contain a short and concise statement as to the convict's domestic and family circumstances, his general reputation and character and if it is to be said that he associates with bad characters, the officer giving evidence must be able to speak of this from his own knowledge".⁹³.

Later it was also made clear in the Kang'ombe case that statements showing previous convictions should also contain important information which is in the defendant's favour, such
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as previous employment and good conduct.

This elaborate procedure, however, is not followed in magistrates' courts in Lusaka. The practice in magistrates' courts reveals a casual adaptation of the laid down procedure. After an accused person is convicted and before he is sentenced, the prosecutor, almost invariably informs the court: "Your Worship, nothing is known about this offender". This rather ambiguous statement could mean several things. It may mean that the offender has no previous conviction or convictions, or that the prosecutor has not yet received information about the offender's background from the Central Records Office at the Zambia Police Force Headquarters, a five minute's walk from the Chikwa Road Magistrate's courts. It may also mean that the prosecutor has not made any efforts to investigate the background
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of the offender.

6:4 (b) Rules Regarding Sentencing of Offenders With Previous Convictions.

In Zambia, the principle to be followed in sentencing offenders with a record is that such offenders should not receive heavier sentences because of their record. Magistrates have had their sentences set aside on appeal because they were allegedly imposed
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on grounds of the offender's record. Thus in Kamba V The People, the appellant was sentenced to 5 years imprisonment for house-breaking involving clothes valued at K11.20. In sentencing him, the magistrate remarked: "You have been pursuing a life of crime since 1956. Sentences passed on you seem to have had no deterrent value whatsoever". In reducing the sentence to 2 years imprisonment, the High Court held:

"We wish to draw attention to the fact that certain

procedures which exist in other countries for sentencing of habitual criminals or persistent offenders whatever they may be called are not part of our law in Zambia. We in Zambia cannot impose a sentence heavier than that which the offence itself merits because a man has a very bad record and we certainly cannot sentence him because he is regared as a menace to society".97.

In another case, the accused had 15 previous convictions for dishonesty. He pleaded guilty to theft from the person of a purse containing K22.00. cash and was sentenced to two and a half years imprisonment. On appeal against sentence, the High Court enhanced the sentence to four years, saying that two and half years was a sentence normally adequate for a first offender. The Supreme Court restored the original sentence of two and half years on the ground that a man's record was not a reason for a greater sentence than that which the offence warranted.⁹⁸

As seen in chapter 3, 32 (or 32%) of the 100 interviewed offenders had previous convictions varying in number from one to 3 (see Table 16). Six of the 32 recidivists were tried and convicted by the High Court and for that reason, they have been excluded from this analysis.⁹⁹ Of all the 32 recidivits, one case is of particular interest and merits some detailed discussion.

The case involved a man aged 36 years, who was unemployed and had 3 previous convictions, all for property offences. His first conviction was for theft of K240.00. cash and he was sentenced to 2 years imprisonment. The second conviction was for store breaking involving clothes and shoes and he was sentenced to another 2 year term of imprisonment. His third conviction was for house breaking involving plates, bedding, clothes and a radio

cassette. He was sentenced to 2 years imprisonment, suspended for 3 years.

At the time of the interview, he was serving a 3 years sentence for burglary involving bedding, clothes and shoes, all valued at K10,000.00. He pleaded guilty to the offence. He informed the writer during the interview that even though the police knew him as a persistent offender, they told the court that "nothing is known about this offender" and at all court appearances, he was¹⁰⁰ treated as a first offender.

The Police Station that handled this case (Matero) was queried about this. The Detective Chief Inspector there denied that this ever happened. He informed the writer that it was inconceivable that a prosecutor could fail to tell the court about the previous convictions of an offender if he was aware of them. That, he said correctly, would be professional misconduct since it would¹⁰¹ mislead the court. But given the lack of coordination of activities between the arresting and prosecution officers as already seen (chapter 5), it is probable that the failure to inform the court of previous convictions in this case could be attributed to that factor.

As indicated above, there was only one offender with a previous conviction among the 354 imprisoned offenders whose case records¹⁰² were studied. He was a 24 year old lorry driver convicted of burglary and theft involving bedding and clothes valued at K58.00. He pleaded not guilty and was sentenced to 18 months imprisonment. In passing the sentence, the magistrate remarked:

"It seems that you have specialised in this type of offence. You are still a young man capable of working to get what you want. I have noted that you were given a suspended sentence in 1982, but now I will give you a custodial one so as to restrain you from committing further offences".¹⁰³.

Magistrates in Lusaka and indeed in the whole country are in some kind of a dilemma. There are cases on the one hand in which they feel that it is their duty to impose a longer sentence on a recidivist as a way of protecting the public. On the other hand, they run the risk of such sentences being set aside on appeal or by case stated method or by the review process. In other countries, specific legislation has been enacted to deal with this problem. In Zimbabwe, for instance, section 367 of the Criminal Procedure Code provides: "...a person may be declared an habitual criminal upon a third conviction for a second scheduled offence". Habitual criminals may be held in prison for an average of 5 years and then released on licence by a Habitual Criminals Board. In England and Wales, section 28 of the Powers of Criminal Courts Act, 1973, creates an "extended sentence" for habitual offenders. The section also empowers the courts to impose a longer sentence on habitual offenders than would have been normally imposed on the circumstances of the case.

What is needed first and foremost is to create conditions under which a realistic estimate of the rate of recidivism can be made. This can only be achieved if the receiving, recording and restoring of information at all Police Stations and at all courts were reorganised with the aid of computers. The present practice which allows recidivists to be recorded as first offenders will then be stamped out. Once a realistic estimate

of the rate of recidivism has been made, it will be possible to formulate policy options on how to deal with this problem. The current trend towards deterrence implies that recidivists should be dealt with more sternly than first offenders. The grounds for stern action is that the previous sentence or sentences have not prevented future offending and that the current offence is aggravated by the previous offending.

At the moment, persistent offenders who are convicted of stock theft and theft of a motor-vehicle, are by statute required to receive longer sentences than first offenders in an apparent contradiction of the Supreme Court ruling on the treatment of persistent offenders as seen above. There seems to be no justifiable reason as to why such a measure cannot be extended to cover other recidivists. The Supreme Court's ruling on the sentencing of recidivists is somewhat unrealistic. The approach adopted by the magistrate in the case mentioned above seems to
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more realistic and in line with conventional wisdom.

6:5 Joint Offenders.

Where two or more offenders are convicted of the same offence, the normal procedure is for the court to establish a proper account of each of the offender's participation in the offence. If the degree of participation in the offence is not distinguishable and subject to other factors, the same sentence
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should be imposed on each offender. Any difference in the degree of responsibility or the presence of mitigating factors on the part of one offender may justify a differentiation in the sentence. It is, for instance, a normal practice to make a

distinction between the sentence for offenders who planned or initiated the offence and those who simply followed.¹¹⁰

The Zambian High Court recognised the above principle in the case of The People V Mubanga and Makungu.¹¹¹ In that case, two co-accused persons aged 25 and 19 years respectively were sentenced to 18 months for store breaking to which they pleaded guilty. The first and older offender had a previous conviction for offences involving dishonesty. The second and younger offender had no previous convictions. Property involved in the offence was valued at K525.00. In sentencing them, the magistrate remarked that the offence was a joint enterprise and that there were no real mitigating factors to justify discrimination in sentence. The High Court quashed the sentence as too lenient and proceeded to sentence the older offender with a record to 3 years imprisonment and the younger and first offender to 2 years imprisonment. The High Court took the view that "considerations of character and antecedents such as age and the number of previous convictions may well justify the differential treatment".¹¹² In the light of the discussion in the last section of this chapter, what this ruling means is that leniency is denied to a recidivist and not that he should be punished more severely.

In another case, the Supreme Court imposed a sentence of 3 years on the first appellant and upheld a sentence of 2 years imprisonment imposed by the High Court on the second appellant on the ground that the former played a leading role in the commission of the offence.¹¹³

In this study, 89 or 25% of the 354 imprisoned offenders whose case records were studied, were jointly convicted. All the joint offenders with the exception of 4 received the same sentence. In other words, in 95.5% of the cases in which conviction was joint, all the offenders involved received the same sentence.

The first two joint offenders who received different sentences were convicted of theft from a motor-vehicle involving two chairs valued at K30.00. Of the two offenders, one was a school boy and the other offender's occupation was not stated on the case record but both of them were 19 years old. The school boy pleaded guilty and was sentenced to 6 months imprisonment, suspended for one year. His co-defendant pleaded not guilty and was sentenced to 114 6 months "simple imprisonment". The case record did not contain reasons for the differentiation in sentence even though 115 sentencers are expected to do so in those circumstances.

The other two co-defendants were jointly convicted of house breaking involving clothes and other goods, all valued at K3,071.00. The first accused person, a house servant aged 40 years, pleaded guilty and was sentenced to 16 months imprisonment. His co-defendant, a garden boy aged 23, pleaded 116 not guilty and was sentenced to 18 months imprisonment. In the absence of reasons justifying the differential sentence in the two cases, it would appear that the different pleas tendered by the co-defendants might have been the deciding factor.

It is not easy to explain why there was no difference in the sentence imposed on the other 85 joint offenders. Unfortunately,

case records do not contain details about the degree of responsibility of each offender. The common factor, however, was that in all the cases involving the 85 co-defendants, they all tendered the same plea unlike the cases discussed above. It would appear that while the plea tendered was not taken into account in fixing the sentence length as seen above, it seems to have been considered in sentencing co-defendants who tendered different pleas.

Case records revealed that in relation to at least 55 of the 85 offenders, (some of whom are mentioned in detail below), there were factors which could have justified a differential treatment of the co-defendants. The differential treatment could have been based on the grounds of age alone or age in addition to medical reasons. Thomas has pointed out that age is a ground of ¹¹⁷discrimination of sentence in a joint offence. Differential treatment of co-defendants could also have been based on the ground of the leading role played by the co-defendant in the commission of the offence.

Differentiation of sentence on the ground of age could have been based on the fact that the co-defendant was either too young (a juvenile) or too old. There were two cases in which three juveniles were jointly convicted with adults. In the first case, two juveniles, aged 18 and 19 years, were jointly convicted of house-breaking with an adult aged 32 years. The property involved in the offence was clothes and a radio cassette, all valued at K630.00. The juveniles and their co-defendant were unemployed and all pleaded guilty. They were all sentenced to

12 months imprisonment and the case record did not contain any
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reason for the sentence.

In the second case, the juvenile, aged 18 years, was a farm labourer whilst his adult co-defendant, aged 29 years, was a driver employed on the same farm. They were jointly convicted of theft by servants involving K1,400.00 cash. Both of them pleaded not guilty and were sentenced to 2 years imprisonment each. As in the first case, the case record did not state
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reasons for the sentence.

On the other hand, differentiation in sentence might have been justified on the ground that the co-defendant was old in addition to his poor health. In one case, 4 adults, all security guards, were jointly convicted of theft from a motor-vehicle in which a battery, a tool box (with tools), one car radio cassette player, a jack and a wheel spanner, all valued at K11,700.00 were stolen. The 4 co-defendants were aged 37, 67, 24 and 24 years respectively and all of them pleaded not guilty. They were all sentenced to 9 months imprisonment, despite the fact that defendant number 2 was an old man of 67 years. In his mitigation, he told the court that he was a Tuberculosis (TB) patient and he had been in hospital for 3 months prior to his arrest. He also informed the court that had it not been for the
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offence, he should have been in hospital. On the other hand, it may be argued that a man of that age who engaged in criminal activities did not deserve any mercy in order to show society's disapproval. But his illness should have necessitated a more lenient treatment.

In the last case, differentiation in sentence should have been based on the leading role played by an older co-defendant in the commission of the offence. In this particular case, an older co-defendant was interviewed in prison and then the case record was examined. Two men aged 20 and 22 years respectively, were jointly convicted of burglary involving clothes, stationnery, sports equipment, electronic goods and cash from a diplomat's house, all valued at K200,000.00. Both men were unemployed and pleaded guilty. They were sentenced to 3 years imprisonment each and no reasons were given. During the interview of the older co-defendant, he informed the writer that he was the prime architect¹²¹ of the offence and his co-defendant was only brought in to help. Thomas has again pointed out that the co-defendant who instigated the offence should be punished more heavily than the one who was only persuaded to take part in the commission of the¹²² offence.

As indicated above, it is not very clear as to why magistrates decided to impose the same sentence on so many joint defendants. It will be seen in chapter 8 that deterrence is the main objective in sentencing property offenders to prison terms. Thomas has pointed out that emphasis on deterrence may militate against sentence discrimination between defendants on account of¹²³ age, record or other mitigating circumstances. That could very well apply to the present study. In addition, it may be that a factor affecting the degree of responsibilty of one defendant may be weighed against a different factor affecting the co-defendant with the result that a similar sentence is imposed on all

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joint defendants.

On the other hand, it may be argued that magistrates in Lusaka and indeed in the whole country, do not have before them enough factual information about offenders and the circumstances of the offence which may warrant a sentence differentiation. Other than information about age, plea, occupation and poorly presented mitigation (often based on general family circumstances as seen above), magistrates do not have any other information on the offender. Courts have no access to social enquiry reports as has been seen already. Professor Read's observation on the situation in East Africa is equally true of Zambia. He says:

"Usually the material upon which the sentence is based consists, apart from evidence given in the trial itself, only of a statement by the accused in mitigation and at best a report by the police as to the previous record of the offender. This will reveal previous convictions if they have been traced, but may not touch on any points in favour of the convict".¹²⁵.

Indeed, information from the police is generally restricted to the facts of the case which are tailored towards securing a conviction. Nothing is said about the education and general
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reputation of the defendant if any. The lack of factual and detailed information on both the defendants and the circumstances of the offence has led to a situation in which magistrates address co-defendants all at once and not individually in the few cases in which sentencing remarks are made. The standard remarks are: "The accused are first offenders and they therefore deserve leniency. However this is a serious offence and they are all sentenced to ...years imprisonment

each". This is yet another example of the sentence fitting the crime and not the offender or both.

It may be said that the failure by magistrates to discriminate in their sentencing of co-defendants in deserving cases creates injustice to the affected defendants. There is reason to believe that in the light of decided cases by the Appeal Courts, some of the sentences imposed on co-defendants in this study could have been quashed on appeal.

In the interest of justice, it is suggested that magistrates should take a different approach in the case of a joint charge. They should enquire from the defendants about the circumstances surrounding the offence. There are two advantages in this approach. Firstly, it will enable magistrates to have a clear picture as to the degree of participation of each defendant in the commission of the offence. In turn, that will make it possible for them to distinguish between naive followers and the experienced instigators of crime. Secondly, that approach will supplement information from the police on the antecedents of each co-defendant.

Magistrates are already doing something on similar lines as suggested here in the case of offenders who plead guilty. They are expected to put certain questions to the defendants who plead guilty in order to satisfy themselves as to the factual basis of the plea. There is no reason why they cannot do the same in the case of a joint charge. In a system like the Zambian one in which the vast majority of defendants are not represented by counsel

(see chapter 2), the responsibilities of magistrates must be wider than those of merely being an independent umpire and sentencer.

6:6 The Overall Range of Sentence.

A "sentence range" is the "lower and upper limits within which¹²⁸ the sentence should normally fall". The sentence range is also known as the "bracket", "normal level", "tariff", "pattern"¹²⁹ or simply as the "range". In the absence of a mandatory sentence, the sentencer arrives at the appropriate sentence within the range of sentence by considering the facts of the case as well as matters affecting the defendant himself. An established range of sentence has one major advantage. It allows the defendant or his counsel, prosecutors and other interested parties to be able to predict before hand, the most likely sentence in a given case. It also ensures a consistent approach in sentencing.

Table 34 shows the range of sentence as found in this study. Overall, the range of sentence for all offences under study was from 15 days to 5 years imprisonment (excluding stock theft and theft of a motor-vehicle to which a mandatory 5 year sentence applies). The analysis of the range of sentence for individual offence categories shows interesting patterns. As Table 34 shows, in the case of theft from the person and theft from a motor-vehicle, the sentence range was from 4 months to 48 months and from 3 months to 36 months respectively. On the other hand, the sentence range for theft by servants and by public servants was from 15 days to 24 months and from 3 months to 24 months respectively. This is a curious result because the maximum

sentence for theft is 5 years, 7 years for theft by servants and 15 years imprisonment for theft by public servants (see Appendix 1). It seems that magistrates have "redefined" offences and have labelled theft as a more serious offence than theft by servants and by public servants. It is odd that despite the heavy sentence for theft by public servants, none of the defendants in this study was sentenced to more than 2 years imprisonment. It is also odd that magistrates should regard theft of private property as more serious than that of public property, contrary to the intention of the legislature.¹³⁰

The same pattern emerges when the sentence range for burglary, house breaking and robbery is examined. Table 34 shows, the range of sentence for burglary was from 6 months to 60 months, 6 months to 36 months for house breaking and 12 months to 60 months for robbery. The maximum sentences for house breaking , burglary and robbery are 7 years 10 years and 14 years respectively (see Appendix 1). Again it seems that magistrates in Lusaka regard theft as a more serious offence than house breaking. It is also curious that despite the heavy maximum sentence for robbery, none of the defendants was sentenced to more than 5 years imprisonment. It could not be argued that there were strong mitigating factors which prevented the passing of longer sentences on defendants convicted of robbery. As seen above, mitigating and personal factors were generally ignored in sentencing. Even though a defendant convicted of robbery may not be sentenced to less than 12 months imprisonment and the number of defendants convicted of robbery in this study is

small, an impression has been created that magistrates generally do not regard robbery as a more serious offence than burglary.

6:7 Minimum Sentences.

Both stock theft and theft of a motor-vehicle are punishable by a minimum sentence of 5 years imprisonment for a first offence and a minimum of 7 years for a second or subsequent offence. In both cases the maximum sentence is 15 years imprisonment (see Appendix 1). The approach to be adopted in sentencing people convicted of stock theft was set out in the case of Chilima V The People.¹³¹
¹³² In that case it was held that:

"Unless the case has some extra-ordinary features which aggravate the seriousness of the offence, a first offender ought to receive the minimum sentence. Such features in the case of stock theft might be an unusual number of animals stolen or facts which point to a well planned rustling operation".¹³³

In the case of theft of a motor-vehicle there is no authority on the same lines as stock theft. The main reason is probably that the minimum sentence is of relatively recent origin in relation to theft of a motor-vehicle as will be seen further in chapter 8. It is, however, clear that before 1974, when the maximum sentence for theft of a motor-vehicle was 3 years imprisonment, the Appeal Courts declined to interfere where magistrates imposed a maximum sentence on first offenders even when they pleaded guilty.¹³⁴ Between 1974 and 1988 when the maximum sentence was raised to 15 years imprisonment, the imposition of a 5 year term of imprisonment even on first offenders was not regarded as excessive by the Supreme Court.¹³⁵ In any case, the general approach set out in the Chilima case referred to above in relation to

stock theft (especially the first part of the holding) should equally apply to theft of a motor-vehicle.

In this study, 14 defendants were convicted of stock theft, 5 of whom were interviewed and the rest had their case records examined. Thirteen of the 14 defendants were sentenced to 5 years imprisonment. One of the 14 defendants was a 17 year old juvenile who was ordered to receive 5 strokes of a cane as the mandatory prison sentence does not apply to juveniles. On the other hand, 10 defendants were convicted of theft of a motor-vehicle 5 of whom were interviewed and the other 5 had their case records examined. Eight of the 10 defendants were sentenced to the minimum 5 years imprisonment and two defendants were sentenced to 6 and 7 years imprisonment respectively.

A 7 year sentence was imposed on a 21 year old unemployed man for stealing a 9 year old Toyota car worth K65,000.00. He pleaded not guilty to the offence and in his mitigation, he only said: "I have a wife and one child". His case record did not indicate whether or not he was a first offender. It did not even seem to contain any "extra-ordinary factors" which could have "aggravated the seriousness of the offence" so as to bring it within the meaning of the Chilima case seen above.

Similarly, a 21 year old driver was sentenced to 6 years imprisonment for theft of a Mercedes Benz car belonging to a diplomat for whom he was a chauffeur. During the interview, he told the writer that he pleaded guilty to the charge and he was a first offender. His case record was subsequently examined and

confirmed this information. The offence was carefully planned and it involved an accomplice with whom a duplicate key was made and who actually drove the car away from the diplomat's office. The car was not recovered and according to the defendant, it was sold¹³⁶ and driven to a neighbouring country.

In an effort to soften the impact of the minimum sentence on the defendants, the then Court of Appeal (now the Supreme Court) held in relation to stock theft that the sentence only applied¹³⁷ to live animals. In this study, two defendants claimed during the interview that the animals they were alleged to have stolen were found already dead. In the first case, a 67 year old charcoal burner said that he found a dead animal in the bush from¹³⁸ which he cut a small piece of steak for a meal. In the other case a 46 year old man said that he found a dead cow in the bush, the owner suspected him to have slaughtered it and reported the¹³⁹ matter to the police. In both cases, the defendants' stories were not believed by the court and they were each sentenced to 5 years¹⁴⁰ imprisonment.

In the case of theft of a motor-vehicle, the Supreme Court seems to have decided that some general principles of the law of theft¹⁴¹ do not apply to that offence. In Kaleo V The People, a case decided before the minimum sentence was extended to cover this offence, it was held that section 265(2) of the Penal Code did not apply to theft of a motor-vehicle. That section states:

"It is theft to take something with an intention to deal with it in such a manner that it cannot be returned in the same condition in which it was at the time it had been taken or converted".

In that case the defendant stole a motor-vehicle for use in a store breaking offence. He later abandoned it but the wiring of the vehicle had been tampered with. The prosecution argued that since the wiring had been tampered with, it brought the case within the meaning of section 265(2) of the Penal Code. The court did not accept that argument, but unfortunately, it did not state any reason for doing so.

The approach taken by Zambian courts to the interpretation of minimum sentencing provisions is similar to how the same provisions have been interpreted in other countries. In Nigeria, Milner has reported the judicial practice as follows:

"Denied the opportunity of mitigating the penalty by the exercise of discretion they (the judges) have resorted to fine points to avoid conviction".¹⁴².

In Malawi, the imposition of a minimum prison sentence of 2 years (to life imprisonment) for theft by public servants is related to the value of property stolen. It has been held in that country that if the value of property stolen is not apparent from the charge sheet, the court should not impose the minimum statutory sentence. Instead, the court may consider acquitting¹⁴³ the defendant or imposing any other appropriate sentence.

In Tanzania, the High Court has ruled that in view of the "exceptional severity of the Minimum Sentences Act, its¹⁴⁴ provisions must be strictly construed". In the United States, the American Bar Association (A.B.A) has characterised the minimum sentence as a "naive and destructive provision". The A.B.A further says that:

"...the real evil of the minimum sentence is the legislature's attempt to determine in advance, necessarily without the advantage of essential information about the particular offence, attributes of an offender's sentence which cannot later be undone if they prove unjust".¹⁴⁵.

It may also be pointed out that the categories of both "stock theft" and "theft of a motor-vehicle" are too broad for a uniform and rigid sentence. Such categories include the number of stolen animals or motor-vehicles, their value as well as the degree of the defendant's participation if the offence was jointly committed. Thus this study found that the minimum sentences were unpopular among magistrates in Lusaka. A large body of opinion among magistrates was that whilst the need for stiffer penalties in relation to the two offences might be recognised, courts should be afforded room to accommodate mitigating circumstances. One of them put it this way:

"Those who steal cattle and motor-vehicles do not expect to go to prison for five years or more. They are so shocked that some of them collapse in the dock upon hearing the sentence. In addition, we as a bench cannot exercise leniency even in cases involving old men and those who show remorse. This law is bad".

Magistrates have responded to the lack of discretion in dealing with minimum sentencing by imposing the very minimum sentence in the majority of cases. Thus in one case, a 26 year old market trader and a first offender pleaded guilty to theft of a motor-vehicle valued at K4,940.00, the property of the Government. The magistrate regretted his lack of discretion in the matter. Sentencing him to 5 years imprisonment, he remarked: "...the only leniency the court may exercise is to pass the minimum sentence".¹⁴⁶

There were cases encountered in this study in which the imposition of five years imprisonment seemed unfair in the totality of circumstances. In one case for example, a 30 year old general worker and a first offender pleaded guilty to theft of one sheep valued at K600.00. In sentencing him to five years imprisonment, the magistrate said: "...I have no choice in the
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matter as my hands are tied". Similarly, a shorter sentence, if there was room for discretion, should have been imposed in the case involving the 67 year old defendant already seen above.

On the other hand, there were cases in which the imposition of a 5 year sentence seemed appropriate. In one of those cases, a 37 year old butchery worker pleaded not guilty to theft of 62 cows and bulls valued at K250,000.00. He was sentenced to 5 years imprisonment. The offence was a carefully planned operation in
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which 3 accomplices were involved.

The minimum sentences are designed to signify the seriousness with which the offences to which they apply are held by the legislature. They are also designed to bring about uniformity in the way magistrates are to deal with people who commit those offences. In the pursuit of the two objectives, however, justice is denied to some defendants in whose respect a shorter sentence should normally have been imposed, owing to the circumstances of the offence and of the offender.

At another level, the existence of minimum sentences emphasises and reinforces the deterrent philosophy of sentencing, which as will be shown in chapter 8 has not achieved its desired results.

In chapter 8, we shall examine the background to the enactment of minimum sentencing legislation and argue that a better sentencing policy is one that allows courts broad discretion.

This chapter has examined the sentence of imprisonment in magistrates' courts in Lusaka. On the whole, it is difficult to determine what principles of sentencing were followed in the cases which were examined in this study. What has emerged is a sentencing regime which aims at passing a sentence designed to fit the offence rather than the offender or both. Hence, magistrates ignore individual factors such as age, illness, the offender's degree of participation in a joint offence and even the type of plea tendered in sentencing. This also underlines the deterrence philosophy of sentencing, contrary to the official policy of rehabilitation, which will be discussed further in chapter 8, where it will be shown that deterrence is the most frequently cited reason for imposing a custodial sentence.

Evidence found in this chapter also seems to suggest that magistrates in Lusaka have re-defined property offences or re-ranked the order of their relative seriousness. For instance, they regard theft as more serious than theft by servants and by public servants, contrary to the intention of the legislature which has provided a more severe sentence for the latter offences. Reasons for this are not clear. In this study a number of interviewed offenders who were convicted of theft by servants and by public servants did not regard themselves as offenders (chapter 3). Those offenders claimed that they had a legitimate defence under customary law, (discussed in chapter 2), which

allowed workers to take for consumption, some of the food produced for their employer. The extent to which some magistrates might have been influenced by that customary law is not clear. What is clear, however, is that even though customary criminal law has been proscribed, some of its aspects have not disappeared. Instead, some aspects of customary law such as matters of procedure and remedies have continued to influence the minds of complainants or witnesses as well as defendants themselves. As chapter 5 has shown, the failure by the criminal justice system to accommodate the above aspects of customary law is the real reason for the withdrawal of some cases by complainants.

On the other hand, the magistrates's apparent view that burglary is more serious than robbery is more difficult to explain. What is clear is that both the official records and this study show that burglary is more prevalent than robbery. It could very well be that in an effort to pursue their deterrent policy, magistrates have resorted to the imposition of longer sentences on those convicted of burglary than on those convicted of robbery. As seen above, the prevalence of the offence may justify a heavier sentence than what would normally be imposed.

Notes.

1 [1969] Z.R. 30.

2 Katongo V The People, foot note 1, at 30-31.

3 [1956] R & N 47. See also the case of The People v Silva and Freitas, [1969] Z.R. 121, in which it was held that any mitigating factor which is not disputed by the prosecution and which is consistent with the facts of the case, may be taken into account in sentencing.

4 D.A.Thomas, op cit, 1980, 194.

5 See for example, Njovu and Tembo, SP 177 (1985) "My wife is pregnant and she has a very small child", Chipampe, 3R 161 (1985) "I am the only child looking after other relatives including my aged parents", Nyeleti, SSP-57 (1988) "My parents are dead and I am the only one supporting my brothers and sisters".

6 See for example Jutronich, Schutte and Lukin V The People, [1965] Z.R. 10-11, Malichini V The People, [1967] Z.R. 137, 138. See also D.A.Thomas, op cit, 211.

7 Nkandu, 2 PB-61 (1988). All imprisonment is with or without hard labour at the discretion of the court, see section 26(1) of the Penal Code. In this study imprisonment was imposed invariably with hard labour, except in cases where it was imposed in addition to a fine as will be seen in chapter 7. What is precisely meant by "hard labour" does not seem to be defined in any legislation or case law.

8 Chisempi, 3P-487 (1987). In another case, a 44 year old man pleaded guilty to theft of 2 door frames and 20 concrete pipes, the property of his employer, worth K1,698.00. In mitigation, he told the court: "I am married to a mentally ill wife and we have 4 children". He was sentenced to 2 years imprisonment. See Chirwa, 1 PB-110 (1988).

9 Mwanza, 2 P1-26 (1988) and Sakala and Bupe, Pb-336 (1986).

10 Mulyata, 2P-77 (1986).

11 Nkonde, SP-268 (1984).

12 R.G.Nairn "Sentencing: The Blinder Aspects of Justice", 11 Rhodesian Law Journal, 113 (1971).

13 McCormick, 9DR (3rd) 248; 47 (1979).

14 See D.A.Thomas, op cit, 195-196.

15 See sections 58, 59 and 60 of the Juveniles Act.

- 16 Section 72(2) of the Juveniles Act.
- 17 Siwale V The People, [1973] Z.R. 182.
- 18 Chishala V The People, [1975] Z.R. 40.
- 19 Musonda and Chishimba V The People, SC 2 No.9 of 1979.
- 20 Nyanqu, 2P-75 (1988).
- 21 Simbongwe, 3PB-416 (1989).
- 22 [1974] Z.R. 58.
- 23 Mumba, 3PB-723 (1989).
- 24 Banda, Sp-7 (1985).
- 25 Sinyangwe, 1PB-170 (1988).
- 26 Mubanga, SP-1248 (1983).
- 27 Mokola, 2P2-32 (1988).
- 28 According to D.A.Thomas, "...variations in the immediate circumstances of the offence such as the value of property stolen...are not mitigatory", op cit, 194.
- 29 See Jutronich et al, foot note 6, per Blagden J.
- 30 Katongo, 2P-5, (1986).
- 31 Sakala, PB-22, (1987).
- 32 See R.G.Nairyn, op cit, 126.
- 33 See D.A.Thomas, op cit, 159. See also R.G.Nairyn, op cit, 127.
- 34 See D.A.Thomas, ibid, 15.
- 35 Thomas supports this view and says that:"...denying credit for mitigation is an exceptional cause limited to cases where a particular emphasis on deterrence is justified or where considerations such as the prevention of further offences are unusually compelling", ibid, 47-48.
- 36 Ziwa, SSP-76 (1986).
- 37 Mukuma, 2P6 (1989).
- 38 A.J.Ashworth, "Prosecution and Procedure in Criminal Justice", [1979] Crim. L.R, 485.
- 39 Benua V The People, [1976] Z.R. 13.

40 R V Wandasi, [1963] R & N 10, The People V Zulu, [1965] Z.R. 75. See also The People V Kanguya, [1979] Z.R.288, in which Sakala J. stated that he was unable to say that by the words "I understand the charge, I plead guilty", the accused pleaded guilty to all the ingredients of the offence.

41 His Honour Judge Jowett QC, "The Relevance to Sentence of a Guilty Plea", The Magistrate, (1986) Vol 1, 42; 134. See also Mwiba V The People, (1971) Z.R. 131, 132.

42 (1981) Z.R 318. In this case, a magistrate sentenced a first offender to 6 years for burglary involving 3 blankets valued at K13.00. The offender had changed his plea from guilty to one of not guilty. In sentencing him, the magistrate made reference to the change of plea and to what he called a "lengthy trial" as the justification for the sentence. The High Court reduced the sentence to 2 years imprisonment.

43 Op cit, foot note 41.

44 Nguni V The People, [1976] Z.R. 168.

45 His Honour, Judge Jowitt QC has also suggested that a 1/5 or a 1/4 of the sentence will generally be an appropriate discount, op cit.

46 I.Clegg et al, op cit (field notes).

47 A.W.Campbell, Law of Sentencing, Rochester, New York, 1978, 338.

48 M.Zander, "What the Annual Statistics Tell Us About Pleas and Acquittals", [1991] Crim.L.R, 252.

49 B.W.Ewart and D.E.Pennington "Reasons for Sentence: An Examination of Empirical Investigation", [1988] Crim.L.R. 584, 597.

50 Benua V The People, foot note 39.

51 J.Baldwin and M.McConville "The Influence of the Sentencing Discount on Inducing Guilty Pleas", in J.Baldwin and A.Keith Bottomley (eds) op cit, 1978, 123.

52 R.Cross, The English Sentencing System, London, 1981, 194.

53 See for instance, Sichilima, who stole 4 pieces of liver, pleaded guilty and was sentenced to 9 months imprisonment, Mwape, stole 4 oranges, pleaded guilty and was sentenced to 12 months imprisonment, Chibale, stole 15 small onions pleaded guilty and was sentenced to 10 months imprisonment, Machishi, stole building materials, pleaded guilty and was sentenced to 18 months imprisonment. All these offenders were caught red-handed.

54 Mubanga, 2P-27 (1986).

55 Interview with Mr.D.Chileshe, Detective Inspector, Chelston Police Station, 17th, November, 1989.

56 Withdrawn cases and the reasons behind the withdrawals have been discussed in chapter 5.

57 For instance, interview with Mr. G.J.C.Kapembwa, Chief Inspector, Kabwata Police Station, 15th November 1989.

58 Interview with Mr.H.Hanamwinga, Assistant Commissioner of Police and Head of the Police Prosecution Branch, 12th. January, 1990.

59 Interview with Mr. Kapembwa op cit, note number 55.

60 Some interviewed offenders maintained their innocence throughout. For instance, Chindumba, (Robbery) interviewed on 23rd August 1989, Mubanga, (Robbery) interviewed on 27th August 1989 and Kumba, (Aggravated robbery) interviewed on 15th September 1989.

61 Mwila v The People, [1969] Z.R. 126.

62 Section 5(5) of the Act defines a first offender as "any person who has not previously been convicted of a scheduled offence or any offence contained in chapters XXVI-XXXIII (inclusive) of the Penal Code". These are the offences to which the Act applies and they include: theft by servants, theft by public servants, theft, robbery, house-breaking, etc. See J.S.Read, "Minimum Sentences in Tanzania" [1965] J.A.L. 31.

63 (1964) E.A. 287. It was held obter dicta that: "An accused person who, having been convicted of the first count would still be a first offender if convicted on the second count immediately afterwards. The expression 'first offender' is one universally recognised in law as meaning an accused who has never been convicted at any previous trial", 288-89.

64 Phiri V The People, [1970] SJZ. 30, per Gardner J.

65 Longwe V The People, [1976] SJZ. 30.

66 Many of the 78 offenders pleaded guilty to their various offences. Reasons why their case records were silent on the matter are not clear. It could have been a slip up on the part of the magistrates.

67 J.Hatchard, op cit, 1984, 172.

68 Longwe V The People, foot note 65.

69 See D.A.Thomas, op cit, 15-16 where he says that an offence which constitutes a breach of trust or abuse of privilege will frequently attract a tariff sentence even though in the absence

of this relationship, the offence might not be considered particularly serious. See also Cross, op cit, 189 and A.J.Ashworth, "Justifying the First Prison Sentence", [1977] Crim.L.R. 667-668.

70 [1968] Z.R. 165. At the time of this offence, K82 was equivalent to £82, a considerable sum of money then.

71 Kalenga V The People, foot note, at 166 per Evans J.

72 Van Zyl V The People, [1965] Z.R. 140, 142 per Dennison J.

73 Chikoloma, 2P2-316 (1989).

74 See, for instance, Tembo, SP-219 (1988).

75 Chinkumbi and Nkuwa, 1Pb-112 (1988), Zulu, 1PB-806 (1988).

76 The People v Simolu, [1981] Z.R. 318, 319 per Moodley J. In one English study, a judge is reported to have said that: "entry of an occupied house in the night must attract a custodial sentence because of the potential for harm to the occupier". See B.W.Ewart and D.E.Pennington, op cit, 592 and also D.A.Thomas, op cit, 150.

77 Simbongwe, 3PB-412 (1989).

78 Kalenga V The People, foot note 70.

79 Kalenga V The People, foot note 70, at 165. Thomas and Cross support this view but they seem to differ on the procedure to be adopted in establishing the prevalence of the offence. Thomas is sceptical about the practice whereby the sentencer elicits evidence of prevalence of the offence from the prosecution after examination of the police by counsel has ended. According to him this practice compromises the independence of the sentencer as he performs prosecutorial functions. Thomas would favour a procedure where the defence could be accorded an opportunity to rebut that evidence. See D.A.Thomas, "Establishing a Factual Basis for Sentence", [1970] Crim.L.R. 80, 88-89.

On the other hand, Cross seems to take the view that a sentencer may be entitled to take judicial notice of the state of affairs and decline to hear evidence about a particular offence being "rampant" or "rife" in the community or in a particular locality. See Cross, op cit, 89-90.

80 Siamende, 2PB-20 (1988).

81 Ngoma, SP-295 (1988).

82 In practice, however, appeals against sentence are very rare. Of the 100 interviewed offenders, only 15 had applied or indicated willingness to do so. The main reason for this is the lack of legal representation. Official statistics do not carry figures on appeals against sentence.

83 D.A.Thomas, op cit, 1980, 151. See also A.J.Ashworth, op cit, 668.

84 Cross, op cit, 188-189. See also B.W.Ewart and D.E.Pennington, op cit, 590.

85 Jutronich et al V The People, foot note 6.

86 Jutronich et al V The People, foot note 6, at 10 per Blagden J.

87 What constitutes "planning" has already been discussed in chapter 3.

88 It was seen in chapter 3 that 80% of burglary offenders, for instance, planned their offences.

89 See Katongo V The People, foot note 1.

90 See for instance, Kashweka, 3PB-440 (1988), Bwalya, 3PB-607 (1989), Soko, 1PB-130, (1988).

91 [1943] All ER 36.

92 [1962] R & N (Northern Rhodesia) 158.

93 Kang'ombe V R, foot note 92, 159.

94 Kang'ombe V R, foot note 92, 160.

95 This practice was noticed during earlier research in which the writer was the principal researcher. See Report on Police Prosecution in Lusaka, op cit.

96 [1972] Z.R. 175. See also Kalyata V The People, [1972] Z.R. 62. According to Thomas, "The fact that an offender has a substantial record of previous convictions does not justify the imposition of a sentence above the level appropriate to the kind of offence he has committed..." op cit, 1980, 197.

97 Kamba V the People, [1972] Z.R. 175, at 177.

98 Alubisho V The People, [1972] Z.R. 11. See also Kunda V The People, [1973] Z.R. 7, Mwenya V The People, [1973] Z.R. 6, Kabwe V The People, [1973] Z.R. 174.

99 It was thought that since this study was restricted to magistrate's courts, it would probably "distort" the results of this particular analysis if offenders tried by the High Court were to be included.

100 Nyirenda. R, interviewed on 6th October, 1989.

101 Detective Chief Inspector E.Mashabe, interviewed on 16th. November, 1989.

102 As was indicated in chapter 3 and evidenced by the case of Nyirenda R, (foot note 100) as well as by official records this is far from being an accurate picture of recidivism in Lusaka.

103 Tembo. L, 3P-327 (1984). The offence for which a suspended sentence was imposed in 1982 was not disclosed on the case record.

104 See J.Hatchard "Readings in Criminal Law and Penology", mimeograph, 1981, 119-120.

105 This dilemma has partly been "resolved" by minimum sentences in the case of stock theft and theft of a motor- vehicle. As was seen in chapter 1 and to be seen further in chapter 8 the sentence is higher for a second or subsequent offence in the case of both offences.

106 R.G.Nairn, "The Habitual Criminal: The Failure of a System", (1974) 14 Rhodesian Law Journal, 40.

107 See also D.A.Thomas, op cit, 1980, 309-315 and Cross, op cit, 51-55.

108 This is also in line with Section 282 of the Penal Code which stated: "If the offender, before committing the offence, had been convicted of a theft punishable under section two hundred and seventy-two, he is liable to imprisonment for seven years". Section 272 provides for the general punishment for theft, i.e 5 years imprisonment. Section 282 has been repealed by section 11 of the Penal Code (Amendment) No. 2) Act No. 29 of 1974.

109 See D.A.Thomas, op cit, 1980, 65 and also his "Sentencing Co-Defendants: When is Uniform Treatment Necessary"?. [1964] Crim.L.R, 22, 23-24.

110 See D.A.Thomas, op cit, 1980, 67 and B.W.Ewart and D.C.Pennington, op cit, 590.

111 [1967] Z.R. 94.

112 The People V Mubanga and Makungu, foot note 111, 94. See also Malichini V The Poeples, [1967] Z.R. 137 and also the English case of Ball V R, (1951) Crim.App.R. 164.

113 Mwapoke V The People, [1976] Z.R. 167, 168.

114 Bwalya and Banda, PB-310 (1986).

115 In R v Kalana, N.R.L.R. IV, 218, Woodward J held: "when discrimination is shown in the sentence imposed upon persons convicted of apparently identical offences, the case record should show the reason for the discrimination".

116 Nyangulu and Phiri, PB-118 (1988).

- 117 Op cit, 1964, 29.
- 118 Sikapatu, Chanda and Another, 2P2-11 (1988).
- 119 Sakala and Tatabuke, 3P-186 (1985).
- 120 Siachingwe, Manginela, Banda and Mwanza, 2P2-48 (1988). In yet another case a joint offender raised illness (he said he suffered from TB) in his mitigation in a burglary charge. Property involved in the offence was one suit, four pairs of trousers, all valued at K5,000.00. Both offenders aged 34 and 23 years respectively, pleaded not guilty and were each sentenced to 20 months imprisonment. See Mwanza and Makulushi, 3PB-109 (1989).
- 121 Mulenga and Chanda, 1Pb-71 (1987).
- 122 Op cit, 1964, 121.
- 123 Op cit, 1980, 68.
- 124 Ibid, 68-69. In the present study, it was not possible to establish that fact due to the limited nature of the information available on the defendants from case records.
- 125 J.S.Read, "Kenya, Tanzania and Uganda" in A.Milner, (ed) op cit, 1969, 122.
- 126 Cross refers to this information as "antecedents report", op cit, 95.
- 127 For instance, Phiri. D and Tembo. F, SPB-45, (1989), Lupiye and Lunda, 3P-218, (1985), Lungu and Mubandi, SP-121 (1988), Kamfwa and Siame, 3PB-362, (1989).
- 128 See D.A.Thomas, op cit, 1980, 33, and Cross, op cit, 173.
- 129 D.A.Thomas, ibid, and see also C.C.Ruby "Range of Sentence", 28 Criminal Law Quarterly, 447.(1986).
- 130 In Malawi, theft by public servants is punishable by a minimum sentence of 2 years imprisonment. See C. Ng'ong'ola, "Controlling Theft in the Public Service: Penal Law and Judicial Responses in Malawi" 32 J.A.L. 72. But this does not signify approval of minimum sentences on the part of the writer.
- 131 Section 3 and 4 of The Penal Code (Amendment) (No. 2) Act No. 1 of 1987.
- 132 [1971] Z.R. 36.
- 133 Chilima V The People, foot note 132, at 36 per Doyle CJ.
- 134 See for instance, Malambadi V The People, [1978] Z.R. 263,
- 135 In Berejena V The People, [1984] Z.R. 19, Silungwe CJ held

that: "We have repeatedly said in this court that an imposition of a five year term even on a first offender who is convicted of stealing a motor-vehicle does not come to us with a sense of shock as being manifestly excessive".

136 Gondwe, interviewed on 4th October 1989.

137 Sialubi V The People, [1971] SJZ. 305.

138 Mulabwa, interviewed on 28th August 1989.

139 Mwiinga, interviewed on 19th September 1989.

140 In both cases, the defendants were asked if they mentioned the fact that they found the animals already dead, to the police and to the court. They replied that they did, but in both cases their protests were regarded as mere excuses. On the other hand, it could have been very well the case that magistrates were not aware of the decision in Sialubi case above (note 137). It will be seen in chapter 7 that some magistrates in this study had no idea that Extra Mural Penal Employment (E.M.P.E), a form of the English community service, existed under the Zambian criminal justice system.

141 [1978] Z.R. 250.

142 A.Milner, op cit, 1972, 56.

143 Kampila V The Republic, HC, Crim App No.9 of 1985, quoted by C.Ng'ong'ola, op cit, 72

144 Ungani V The Republic, Law Report Spp. T.Gazette No.2 of 1964, 1, quoted by Read op cit, 22.

145 A.W.Campbell, op cit, 100-101.

146 Tembo, SPB-47 (1988).

147 Nyanqu, SSP-76 (1988). The Penal Code (Amendment) (No.2) Act No.1 of 1987, referred to above (note 131) excludes sheep from the list of animals to which the minimum sentence applies. That list only mentions theft of a "bull", "cow", "ox" or the young of such animals (see Appendix 1).

148 Mbayama, interviewed on 20th September 1989.

CHAPTER 7

SENTENCING: NON-CUSTODIAL MEASURES.

7:1 The Suspended Sentence.

It has been pointed out in England that there¹ is little authority on the suspended sentence mainly because cases in which magistrates impose it rarely reach the High Court on appeal. The same applies to Zambia.² In England, however, the previous good character of the offender³ and the fact that the offence was relatively less serious and committed "under circumstances of substantial mitigation"⁴ are matters often taken into account. But Cross has also observed that it is not clear to what extent the court can take personal circumstances into account. Thus, he has further pointed out:

"Indeed if the court has taken full account of mitigating factors in calculating the appropriate length of prison sentence, then there will be, so to speak, no mitigation left to be taken into account when deciding whether or not to suspend".⁵

The few decided cases from the Zambian Appeal Courts (High Court and Supreme Court) seem to suggest that the most important consideration in the decision to suspend a sentence is the extent to which the public needs to be protected from the offender. In the case of Massissani V The People⁶ it was held that:

"A material consideration in awarding a suspended sentence is the extent to which the suspension would fail to protect the public, either directly by leaving the offender at large or indirectly by serving as an indirect deterrence. The extent to which the court will be influenced by mitigating factors such as the previous good character, the fact that he is in regular employment, a student, or a mother of young children etc, will depend on the circumstances of each given case".⁷

In the case of Munungwa V The People, it was held that the purpose of a suspended sentence "is to keep a person out of prison by providing him with an incentive or added incentive not to repeat the offence."

In this study, as Table 28 shows, 74 out of the 184 offenders in whose respect a non-custodial order was made were given a suspended sentence. Of the 74, 63 offenders had the whole of their sentence suspended, 5 had a part of their sentence suspended whilst 6 were ordered to pay a fine, compensation or to undergo caning, in addition to a suspended sentence.

7:1 (a) Factors which Influenced the Magistrates in Imposing a Suspended Sentence

The lack of reasoned decisions makes it difficult to determine what principles magistrates followed in imposing the suspended sentence. Analysis of case records for the 74 defendants in whose respect this sentence was imposed revealed that the following factors were taken into account: value and recovery of stolen property, age, sex and family responsibilities of the offender, previous good character of the offender, police handling of the trial and the type of victim.

A number of case records revealed that the value of the property stolen in the cases in which the sentence was suspended was relatively small. The value of the property stolen in many of those cases ranged from K6.00 to K80.00. In cases where the property was of (relatively) high value, the fact that the property in question was all recovered seems to have been a major

factor in the decision to suspend the sentence. Thus in one case, a 23 year old first offender pleaded guilty to theft by servants involving a photo-copying roll, valued at K350.00. In sentencing him to 9 months imprisonment, suspended for 3 years, the magistrate said that he had "taken into account the ¹⁰ fact that the item has been recovered".

In a number of cases, the advanced age of the offender in addition to his good conduct was considered in passing a suspended sentence. In one case a 51 year old first offender pleaded guilty to theft by public servants involving 6 pieces of fish and a 2.4 kg. of maize meal all valued at K31. In mitigation he told the court that he was married with 7 children. In sentencing him to 6 months imprisonment suspended for 3 years the magistrate remarked that: "At his age and this being his first conviction, the accused person had all along led a law ¹¹ abiding life". It may be difficult to determine whether it was his age or his good character which was given a weightier consideration. But given that in nearly all cases, magistrates dealt with first offenders, the offenders' age was the major factor considered here. The value of the property was very small. It may be said that had the offender been a younger person, he probably would have been given the same sentence

In another case the age of the offender was considered in the light of the fact that the property involved was recovered. In that case a 45 year old first offender pleaded not guilty to theft by servants involving 32 tablets of spring margarine valued at K400. In mitigation, he talked about the plight of his

children if he was sent to prison. In sentencing him to 6 months imprisonment suspended for 9 months, the magistrate said that "the accused person is an old man and the property in question¹² was recovered".

The fact that the offender was a woman with family responsibilities was a major factor taken into account in imposing a suspended sentence. Four of the 74 offenders were females three of whom had small children. Thus in one of those cases a 32 year old first offender pleaded guilty to theft by servants involving cleaning material worth K81.50. She was a single mother with 6 children. In sentencing her to 3 months "simple" imprisonment suspended for 18 months, the magistrate remarked¹³ that "She is an unmarried woman and the property was recovered". In another case, a 29 year old woman pleaded guilty to theft by servants, involving an assortment of medicines, valued at K10,869.59. She was a first offender and in sentencing her to 6 months imprisonment suspended for 2 years, the magistrate said:¹⁴ "She has 6 children, the youngest being only six months old".

In some cases it appeared that the particular way of handling the case by the police might have led to the passing of a suspended sentence. In one rare case a 22 year old unemployed first offender pleaded guilty to burglary and theft involving clothes worth K233.25. When asked to say something in mitigation of sentence, he made a statement to the effect that the police had assaulted him and broken his arm when they apprehended him. The police denied the accusation saying that the fracture was an old one which occurred before the arrest. The magistrate ruled

that before passing sentence the offender should be medically examined in order to ascertain when the fracture occurred, pursuant to section 17 of the Criminal Procedure Code. The case was adjourned for that purpose. On the day of the hearing the prosecutor informed the court that he had been unable to take the accused person to the hospital. The magistrate then ruled: "...since the accused person had not been examined he should be given the benefit of the doubt" and then sentenced him to 12 months imprisonment suspended for 3 years. This appears to be an isolated case and its potential as a general principle is doubtful.

It would appear that in certain cases the relationship between the offender and the victim may lead to the award of a suspended sentence. Magistrates are probably of the view that cases involving members of the same family should be settled within the families concerned. In one of those cases a 20 year old unemployed first offender pleaded guilty to house breaking involving clothes and bedding all valued at K5,256. In mitigation, he told the court that he "took" the bedding because he did not have any and he wanted to keep them for his own use. In sentencing him to 18 months imprisonment, suspended for 24 months, the magistrate said:

"I have also observed that this case has a domestic aspect to it, the complainant is the father of the accused person. I can give him a second chance, this, however, does not mean that he will go unpunished".¹⁷.

7:1 (b) Partly Suspended Sentence.

18

In Mubanga v The People, the Supreme Court held that :

"A usual course is to suspend the whole sentence, but there may be cases in which a short sharp sentence of imprisonment may bring home to a person what he is laying himself open to and may well induce him not commit fairly commonplace offences in the future".¹⁹.

The Advisory Council on Penal Reform in England and Wales hailed the partly suspended sentence as useful in that it provides a²⁰ "double deterrent effect": the first deterrent being in actual custody and the second being in the postponed possible punishment.

As indicated above, 5 of the 74 offenders had their sentences partly suspended. The five offenders included one female. The female offender was aged 19 and a first offender who pleaded guilty to theft by servants involving clothes valued at K715. Unlike the other three female offenders referred to above, she had no children. Although her case record does not state so, it would appear that the fact that she had no children placed her outside the normal run of cases to which a wholly suspended sentence applies. She was sentenced to 9 months "simple"²¹ imprisonment, 6 months of which was suspended for 12 months.

In the other two cases, the value and nature of property stolen might have militated against the suspension of the whole sentence. In one of the cases, for example, a 22 year old first offender pleaded guilty to theft by servants. A variety of expensive property was stolen: 3 Honda car engines, 1 wrist watch, 1 iron, 2 chairs, 1 grinding mill machine, 1 hammer-mill and 1 radio cassette all valued at K61,420. In mitigation, he talked about the plight of his newly born baby and the illness of his in-laws. He was sentenced to 3 years imprisonment,²² 18 months of which was suspended for 2 years.

7:1 (c) Suspended Sentence Combined with other Orders.

Six of the 74 offenders were ordered to pay a fine or compensation, or ordered to undergo caning in addition to a suspended sentence.

A fine was ordered in addition to a suspended sentence in a case involving a 29 year old civil servant. He was convicted of theft by public servants involving government diesel worth K806.40. to which he pleaded not guilty. In mitigation, he told the court that he had 4 children and 4 other dependants. He also mentioned the fact that he had worked for 8 years as a civil servant and he had lost his job. He was sentenced to 6 months imprisonment suspended for 18 months. In addition, a fine of K100. was imposed on him "...in order for him to appreciate the seriousness of the offence".
23

It has been pointed out that the practice in other countries, notably England, is that an order of a fine is normally made in addition to a suspended sentence in cases where the offender has made substantial profit from the offence.
24
Zambian magistrates, at least in Lusaka, do not seem to follow this principle, as will be shown later in this chapter in the section on Financial Orders. But it is difficult to make firm conclusions here due to the small number of cases in which a fine was ordered in addition to a suspended sentence.

Compensation as additional measure was ordered in a house breaking case involving a 33 year old unemployed first offender. The offence involved clothes, food, shoes, clothing material and

5 cushions from the sitting room furniture, all valued at K1,418. He pleaded guilty to the offence, but said nothing in mitigation of sentence. He was sentenced to 9 months imprisonment suspended²⁵ for 2 years and ordered to pay K100 compensation. As is the case with the additional order of the fine, the case record here does not indicate why the compensation order was made. There is no indication on the case record that the defendant had intended to bring a civil action nor does it show that he suffered financial loss in the course of the trial either of which could justify a compensation order as seen in chapter 2. It seems that there are very few cases in which compensation is ordered in addition to a suspended sentence and that creates a problem about making firm conclusions.

Four offenders who were jointly convicted in two separate cases were in addition to a suspended sentence ordered to undergo caning. One of the cases involved 2 men aged 21 and 22 years respectively, who were convicted of theft from the person. The property in the offence consisted of shoes, clothes and K1,500. cash, all valued at K2,630. They both pleaded not guilty and in mitigation, they pleaded for leniency as they were students. In imposing a 9 month prison sentence on them, suspended for 2 years and an additional 6 strokes of a cane on each, the magistrate remarked:

"The offenders deserve leniency being students, but I have to impose some form of punishment which will make the two boys feel that they did not get away with it".²⁶

A combination of a suspended sentence with additional orders suggests that magistrates regard the suspended sentence on its

own as too lenient. This judicial attitude to the sentence is also prevalent elsewhere. In one English case, for instance, Lord Parker made the following remark about the suspended sentence combined with a fine:

"...in many cases, it is quite a good thing to impose a fine, which adds a sting to what might otherwise be thought by the offenders as a let-off".²⁷.

From another point of view, additional orders to the suspended sentence may be seen as a "price" for the suspension and this probably accounts for the seemingly arbitrary manner in which they were imposed in the cases in this study.

Further it seems that a combination of a suspended sentence with other non-custodial orders somewhat contradicts the basic philosophy behind this sentence. As will be seen further in this section, a suspended sentence should only be imposed after all non-custodial measures have been considered and found inappropriate. Thus Bottoms, for instance, has argued that since the suspended sentence is a sentence of imprisonment, additional orders such as the fine should only be made in cases where it would be appropriate if the sentence was one of immediate imprisonment.²⁸ It will, however, be argued in chapter 8 that the suspended sentence, if imaginatively used in combination with other non-custodial orders such as E.M.P.E., could be a viable alternative to immediate imprisonment.

7:1 (d) Conditions for Imposing a Suspended Sentence and the Length of the Operational Period.

Somewhat contrary to the provisions of the Criminal Procedure Code, as seen in chapter 2, the compensation and caning orders

were not imposed as a condition for imposing a suspended sentence. Rather, they were ordered as additional penalties in their own right in the belief (as seen above) that a suspended sentence alone was not enough punishment.

All the conditions imposed related to the future conduct of the offender during the operational period of the suspended sentence. Magistrates expressed the conditions in different languages but they conveyed the same meaning. In the majority of cases the suspended sentence was imposed on condition that "the offender²⁹ does not commit any offence involving dishonesty", or that "the offender³⁰ does not commit a similar offence" during the period of suspension. This condition for imposing a suspended sentence has emerged out of judicial practice as neither the Penal Code nor the Criminal Procedure Code mentions it as such. Hence both Codes are silent on the question of what type of offence or offences should be committed in order for the suspended sentence to be activated.

In one case, however, an unusual condition was imposed for a suspended sentence as it required the offender "not to commit any offence" during the operational period. The case itself did not seem unusual in terms of its circumstances or in the circumstances of the offender. The case involved a 25 year old security guard who had earlier pleaded not guilty but later changed his plea to guilty to theft by servants. Property involved was a bag of cabbages valued at K855. In mitigation, he told the court that he was married with 3 children. He also said that he suffered from chronic nose bleeding and stomach troubles.

He was sentenced to 2 years imprisonment suspended for 6 months on condition that he did not commit any offence during that³¹ period. This is clearly an isolated case and it does not represent the general practice.

The length of the operational period of the suspended sentence ranged from 6-36 months. The substantial majority of offenders, however, (54 or 73% of the 74 offenders) had their sentences suspended for the period between 12-24 months.

7:1 (e) The Length of the Suspended Sentence and the Length of an Immediate (Prison) Sentence Compared.

We may now return to the question whether magistrates tended to impose longer prison sentences in the cases where they suspended the sentence than they did in the cases where they imposed immediate imprisonment. In England, for example, research³² evidence shows that this is the practice in magistrates' courts.

In chapter 6, we saw that the overall range of sentence for imprisoned offenders was from 15 days to 60 months (see Table 34). As for offenders in whose respect a suspended sentence was ordered, Table 35 shows that the range of sentence was 3 months to 36 months. The number of offenders per offence category in the case of the suspended sentence was too small to allow a meaningful comparison on that basis with the sentence of imprisonment. This seems to suggest that magistrates in Lusaka do not regard the suspended sentence as a sentence of imprisonment. But this picture looks blurred when other aspects of both sentences, such as the age of offenders is examined. As Table 30 shows, the distribution of offenders per age categories

for both the suspended sentence and immediate imprisonment is remarkably similar. From Table 30 it can be seen that the substantial majority of offenders, i.e a total of 279 or 78.8% of the 354 offenders in whose respect the sentence of imprisonment was imposed, were aged between 19-34 years. Similarly, 58 or 78.4% of the 74 offenders in whose respect a suspended sentence was ordered were aged between 19-34 years. In fact Table 30 clearly shows that magistrates in this study singled out both imprisonment and the suspended sentence for adult offenders. However, it leaves one with no clear picture as to whether magistrates regard the suspended sentence as a custodial sentence or a non-custodial sentence.

As was seen in chapter 2, the line of reasoning for imposing a suspended sentence is quite elaborate. The magistrate must decide that all non-custodial measures such as discharge (absolute and conditional), probation, Extra Mural Penal Employment (E.M.P.E), and the fine, are all inappropriate in the particular case. Having decided that, the next question he must address himself to is whether or not the sentence of imprisonment should be immediate or should be suspended.

It is difficult to determine whether or not magistrates in Lusaka apply this reasoning in all the cases in which they order the suspension of sentence. We have seen above that there was no difference in age distribution between offenders in whose respect the prison sentence was immediate and those in whose respect it was suspended. On the other hand, the sentence length was much shorter for those offenders whose sentence was suspended than

those whose sentence was immediate (imprisonment). This implies that magistrates in Lusaka do not regard the suspended sentence as a sentence of imprisonment. Rather they regard it generally as a non-custodial measure and specifically as a form of probation for adult offenders. Hence, as Table 30 shows, no adult offender was put on probation and only 6 of the 74 offenders given a suspended sentence were juveniles. There seems to be a relationship between probation and the suspended sentence. It will be seen later in this chapter that the suspended sentence is very similar to the conditional discharge and that there is need to formulate clear criteria as to when each of them should be imposed. What all this means is that, contrary to the intention of the legislature, the suspended sentence has not produced its desired effect, ie, to reduce the prison population.

In England, it has been shown that the suspended sentence is being used for offenders who would not have been sent to prison before 1967, when this order became available. Thus its role in reducing the prison population remains unfulfilled.

7:2 Caning.

In 1973, the Appeal Court in Alakazamu v The People laid down important rules relating to the order of caning as it applied to adult offenders convicted of property offences. In that case, the accused person was convicted of theft to which he had pleaded guilty. He had a record covering a period of 20 years, though only 4 of the unnamed number of offences involved dishonesty. The magistrate sentenced him to 2 years imprisonment and ordered him to receive 24 strokes of the cane. The High Court dismissed his

appeal against the sentence.

The Appeal Court firstly interpreted the meaning of "circumstances where it is expedient in the interest of the community" specified in section 24 of the Penal Code as the justification for the order of caning. According to the court, the legislature by those words meant that caning can be ordered "where the offence is so prevalent that other forms of punishment have ceased to have a sufficient deterrent effect on members of the community"³⁷. Caning is therefore to be justified as a general and not as a specific deterrent measure in its application to adult property offenders.

Secondly, the Appeal Court warned:

"...courts should be slow to order caning because we do not think that the legislature intends in this morden day and age that this kind of punishment should be used save to deal with exceptional outbreaks of crime".³⁸.

Consequently the caning order was set aside.

³⁹
In the more recent case of Berejena v The People in which the offender was convicted of theft of a motor-vehicle and sentenced to 5 years imprisonment and ordered to receive 5 strokes of a cane, on appeal against sentence, the Supreme Court's decision is important in two respects. Firstly, it described caning as "a form of inhuman or degrading punishment", which should be discouraged. Secondly, the Court held that caning was uncalled for when a long sentence of imprisonment has been passed. The caning order was held to be wrong in principle and therefore set
⁴⁰
aside.

As can be seen from Table 28, caning in this study was ordered against 65 offenders. The same Table also shows that offenders convicted of theft by servants, burglary and house breaking were more likely to receive the caning order than other offenders. Table 30, on the other hand, shows that of the 65 offenders who received the caning order, 41 or 63% were juveniles and 24 or 37% were adult offenders. The number of strokes ordered for all offenders ranged from 2-10. Six of the 65 offenders, who were all adults, were in addition to the caning order given various non-custodial sentences.

As for juvenile offenders, The Supreme Court has held that they should not be sent to prison unless there is no other way of dealing with them, as already seen (chapter 6, Siwale V The People). This is designed to prevent juveniles becoming⁴¹ "hardened criminals". Caning is therefore used not as a deterrent measure but as an alternative to imprisonment in as far so it applies to juvenile offenders.

The number of strokes awarded to juveniles ranged from 2 to 10 but the largest number of them (26 of the 41) received 6 strokes each, 10 juveniles received less than 6 strokes each and 5 of them received 10 strokes of the cane each.

The number of strokes ordered progressed according to the age of juveniles. Thus all the juveniles who were awarded 2 strokes each (and who numbered 4) were aged 13 and 14 (the youngest in the group). On the other hand, all those who were awarded 10 strokes each (the highest number) were aged between 17-19 years (the

oldest age category).

It also appeared that older juveniles tended to commit crimes involving property of higher value which probably accounted for the higher number of strokes ordered against them. Thus in one case for example, a 19 year old student pleaded guilty to house breaking involving a television set and a radio cassette all valued at K17,500.00. He was ordered to receive 10 strokes of the ⁴² cane.

As already mentioned 24 adults were ordered to undergo caning. The number of strokes ordered against them ranged from 2-10 as already mentioned above. But proportionately, more adults were awarded a higher number of strokes than juveniles. Thus, whilst only 10 or 24% of the juveniles were ordered to receive 10 strokes each, 17 or 70.8% of the 24 adults were ordered to receive the same number of strokes. On the other hand only one of the 24 adults recieved 2 strokes of the cane (the lowest number) whilst 4 of the 41 juveniles received a similar number of strokes.

The differential treatment of adult and juvenile offenders, on the face of it implies the underlying deterrence policy of sentencing. Caning is used against juveniles not as a deterrent measure. Rather it is used as an alternative to imprisonment. Hence the "leniency" shown the juveniles in the way caning was used. But for adult offenders, caning is supposed to be a deterrent measure (see above) in order to deal with an exceptional outbreak of crime. It may be said that the severity

with which it was applied to adult offenders in this study was designed to achieve the deterrent objective. But as will be seen in another section of this chapter, magistrates in their sentencing remarks seemed to have implied a different set of objectives.

7:2 (a) The Reason for Awarding Caning.

There seems to have been a lack of appreciation on the part of magistrates of the objective that caning is designed to achieve. In this study it appears that it was ordered for a different objective from the one spelt out in the Alakazamu already discussed. Contrary to this case, magistrates seem to have awarded caning as a "lenient" alternative to imprisonment.

In one case a 23 year old first offender pleaded guilty to theft by servants involving a Honda spraying machine worth K45,000. In mitigation, he told the court that he was the only one looking after his aged parents. In awarding 8 strokes of a cane the magistrate remarked, "...you are fortunate that property was recovered otherwise I would not have been lenient with you at ⁴³ all". In another case, two men aged 29 and 30 respectively were jointly convicted of theft by servants involving 10 pairs of bed sheets valued at K441. In mitigation, the first accused said that he was sorry, that the devil had tempted him and that he had received too many visitors and needed money. The second accused only asked the court to be lenient with him. Both men were first offenders and they pleaded guilty. In awarding 6 strokes of the cane against each offender, the magistrate said: "You are both lucky the property was recovered otherwise I would not have been

lenient with you"⁴⁴. It is difficult to see how such brutal punishment as caning could be described as "lenient". It seems that magistrates may confuse leniency with expediency.

On their part, some adult offenders seemed to regard caning as a better alternative to imprisonment. In one rare case, for example, the magistrate asked a 22 year old offender if he wished to be caned or to be sent to prison. He elected to be caned and 10 strokes of the cane were awarded against him.⁴⁵ The preference of caning to a custodial sentence on the part of that offender could hardly be genuine. That "choice" must be seen against the reality of prison conditions, which as will be seen later in chapter 8 are extremely harsh.

7:2 (b) Caning Combined with other Orders.

As indicated above, 6 adults were awarded non-custodial orders in addition to caning. Three of the 6 offenders were jointly convicted of burglary and the other 3 were convicted of theft from a motor-vehicle, theft from the person and theft by servants respectively. From their case records, it is difficult to determine any clear principles which were followed by magistrates in the sentencing of these 6 offenders.

In one of the cases, a 30 year old market trader pleaded not guilty to theft from a motor-vehicle involving a tin of Vetretex paint valued at K230. In mitigation, he told the court that his wife had just died, leaving an 8 year old daughter. He was awarded 6 strokes of a cane. In addition, two other awards were ordered against him: a fine of K400.00 or 6 months simple

imprisonment in default and one year sentence of imprisonment
suspended for one year.⁴⁶ No reasons were given for that rather
strange combination of orders. The case did not seem to be
outside the normal run of cases for which caning alone without
any additional order might be regarded as sufficient. What is
clear, however, is that in this study offenders convicted of
theft were sentenced to longer prison terms than, say, those
convicted of theft by servants (seen chapter 6). That could have
been the reason why in this particular case the magistrate
thought that a caning order alone was not sufficient punishment.

The other case in which additional orders were made involved 3
men aged 20, 21 and 25 respectively. They were jointly convicted
of burglary to which they pleaded guilty. All the 3 men were
first offenders. Property involved was one ITT radio valued at
K239. In mitigation, the first accused only said that he was
sorry for what he did, the second accused talked about the plight
of his two children if he was sent to prison and the third
accused simply asked the court for leniency. They were all
ordered to receive 8 strokes of a cane each. In addition, they
were each fined K250.⁴⁷ The order of the fine was not accompanied
by a prison term in default of payment, which is usually the
case. This case was probably aggravated by the group nature of
offending or by the vulnerability of the victim who was a female.⁴⁸

Of the 100 offenders who were interviewed, only one was ordered
to undergo caning in addition to his prison sentence. He was a
32 year old unemployed man who committed house breaking with two
accomplices. He was a first offender and he pleaded guilty. The

offence was carefully planned and executed in which a servant of the victim was also involved. Property stolen was clothes, curtains and bedding all valued at K25,000. He was sentenced to 3 years imprisonment. In addition, he was ordered to receive 10⁴⁹ strokes of a cane, even though according to the Berejena case, it is wrong in principle to order caning when a long prison sentence is imposed. Given that the range of sentence for house-breaking is between 12-18 months, the sentence of 3 years was exceptional in this case. As can be seen in Table 34, only 4 out of the 45 offenders convicted of house-breaking were sentenced to 3 years imprisonment.

In this study, caning seemed to have been correctly ordered as an alternative to imprisonment in the case of juvenile offenders. This is in line with the Penal Code and the provisions of the Juveniles Act. In the case of adult offenders, however, caning did not seem to have been ordered in line with the ruling of the Supreme Court and the provisions of the Penal Code. According to both the Supreme Court and the Penal Code, caning should be ordered as a general deterrent measure where property crime is prevalent. In this study, magistrates seemed to have awarded it against adult offenders as a "lenient" alternative to imprisonment as was the case in relation to juvenile offenders.

But there is little evidence, if any, to support the view held by Zambian Appeal courts that caning has more deterrent value than other sentences. In his earlier work among juveniles in the then Northern Rhodesia, Clifford found that some juveniles who had been ordered to undergo caning had several scars on their

buttocks, evidence of having been caned before. Milner's observation is important here. He says that:

"...exposure to regular corporal punishment as a child followed by a criminal career, active enough to lead to a court to order corporal punishment, might well immunise an offender against change and punishment would become merely a professional hazard which would neither improve nor harm him and simply not affect him at all".⁵¹

It has also been pointed out that corporal punishment only invokes bitterness against society in the recipient. For some offenders, that bitterness may "transform an otherwise innocuous transgressor into an anti-social and violent criminal".⁵²

Interestingly, however, corporal punishment enjoys some measure of support among some writers. One Nigerian writer, for instance, has favourably spoken of this punishment in the following terms:

"In our view, caning is morally and socially acceptable and is certainly relevant. Other forms of corporal punishment such as dismembering of the human body are barbaric and revolting. But in our view, caning is to be preferred to a short term sentence. The accused directly receives the physical pain, he does not lose his job, he remains with his family, the stigma of an ex-convict is avoided and he simply cannot forget the punishment easily enough for him to return to the crime committed".⁵³

On the other hand, Milner has suggested that in some parts of Nigeria, "the highly aggressive punishment of children" which is "commonplace" and "the judicial belief in the value of beating children" which enjoys "extensive cultural support" are the basis for corporal punishment.⁵⁴

In Zambia, the judicial view on corporal punishment seems to be changing. In the Berejena case, decided in 1984 and discussed above, the Supreme Court nearly declared caning unconstitutional

under Article 17 of the Constitution, but could not do so because the unconstitutionality of this punishment was not in issue. That Article states: "No one shall be subject to torture or to inhuman and degrading punishment or treatment". Recently, the Supreme Court of Zimbabwe declared caning as a violation of a similar constitutional provision of that country.⁵⁵

The sentencing policy to be suggested for Zambia later in this thesis will seek a departure not only from the custodial sentence but also from corporal punishment in favour of the more widely acceptable and viable non-custodial measures.

7:3 Financial Orders.

7:3 (a) One Day's Imprisonment Plus a Fine.

56

All property offences in Zambia are classified as felonies. The sentencing of offenders convicted of felonies is governed by section 26(3) of the Penal Code which states as follows: "A person convicted of a felony, other than manslaughter may be sentenced to pay a fine in addition to imprisonment". This section, however, does not specify whether imprisonment should be immediate or suspended. It would appear, however, that "imprisonment" includes both the suspended sentence as well as immediate imprisonment. As will be seen later under this section magistrates did in this study impose a suspended sentence in addition to a fine. In England and Wales, the Court of Appeal has held that courts can impose a suspended sentence in combination with a fine.⁵⁷

One of the earliest cases interpreting section 26(3) of the Penal

Code is R.V Chilwa Musenge. In that case the accused was convicted of theft by servants and was ordered to pay a fine of 15 shillings or to undergo 2 weeks imprisonment in default. The High Court set aside the order and held that "the sentence must include imprisonment in addition to the fine because the offence of which the offender was convicted was a felony". The fine was set aside and substituted with a sentence of one day's imprisonment plus 15 shillings fine or 2 weeks imprisonment in default of payment of the fine. This approach was reaffirmed in the more recent case of The People v Chibawe.⁵⁹ It may be mentioned that section 26(3) of the Penal Code does not positively prohibit the imposition of fines unaccompanied by imprisonment. The courts have interpreted "may" in that section to mean "must".

The sentence of one day' imprisonment plus a fine is not provided for under the Penal Code or indeed under any other law. It evolved through judicial practice in order to cover offenders for whom other non-custodial measures such as the suspended sentence or caning are not suitable. It also covers offenders for whom a fine alone would have been a sufficient penalty in the absence of section 26(3) of the Penal Code. In every respect this sentence represents judicial innovation designed to water down the rigidity and severity of sentences provided under the Penal Code.

In the present study, 17 of 184 offenders were sentenced to one day's imprisonment plus a fine. Twelve of the 17 offenders were convicted of theft by servants, 2 were convicted of theft from

a motor-vehicle and 2 were convicted of burglary and one was convicted of theft by public servants.

It is difficult to determine what factors were considered in imposing this sentence. The most common factor in nearly all the 17 cases, however, was that the property stolen in the offences was recovered and the court had made an order for it to be returned to the owner. That was the position in 13 of the 17 cases. But as seen in chapter 6 the extent to which magistrates took into account the fact that the offender did not benefit materially from the offence was not clear.⁶⁰ In the case of 4 of the 17 offenders, their youth was probably the main deciding factor. Two of them were juveniles aged 19 years each and the other two were aged 20 years each.

An interesting question is how the levels of fines were determined in the 17 cases. Under the Penal Code, as seen in chapter 2, the amount of the fine to be imposed on the offender is "unlimited but shall not be excessive".⁶¹ There is, however, an unwritten rule that the court must take into account the offender's ability to pay.⁶² According to Thomas, the sentencer is under an obligation to ensure that the fine imposed is within the offender's level of income and resources.⁶³ It has also been pointed out that the reason for imposing a fine in addition to imprisonment is to ensure that the offender is prevented from enjoying the fruits of his crime.⁶⁴

Table 36 shows that fines ordered against the 17 offenders ranged from K100.00 to K2,000.00. and that 13 of the 17 offenders were

fined amounts ranging between K200.00 to K500.00. Only two offenders were fined more than K500.00 (K1,000.00 and K2,000.00 respectively) and only one offender was fined K100.00.

Table 37 shows whether there was any relationship between the value of property stolen and the amount of the fine ordered to be paid. It shows that the value of property stolen by the 17 offenders ranged from K260.00 to K60,000.00. Table 37 does not present any strong evidence that magistrates took into account the value of property stolen in fixing the amount of the fine so as to deprive the offender of the fruits of his crime. Two offenders, for instance, stole property valued at K26,000.00. each but they were fined only K200.00. each. On the other hand, two other offenders stole property valued at K4,800.00. each but they were fined K500.00. each. Similarly, two offenders who stole property worth only K260.00 each were fined K300.00 each. By contrast, an English study by Softley found that the value of property involved in the offence was associated with the amount
65
of fine imposed.

Table 38 show whether the ability of the offender to pay the fine was taken into account when imposing the fine. The best way to test this was to compare the occupation of the offenders with the levels of the fine ordered. Of the 17 offenders, only one was unemployed at the time of the offence and one was a student. The rest of the offenders were employed, the majority of them, as general or unskilled workers. It would appear therefore that magistrates did take into account the ability of the offender to pay even though the only unemployed offender in the group was

ordered to pay a relatively high fine of K500.00. This is consistent with the practice in English magistrate's courts as found by Softley.⁶⁶

7:3 (b) The Fine.

As seen in the previous section, section 26(3)) of the Penal Code, as interpreted by courts makes it illegal to impose a fine unaccompanied by imprisonment on offenders convicted of a felony. Thus only one offender, a juvenile from the group of offenders whose case records were studied, was ordered to pay a fine through her parents. Two of the 100 interviewed offenders were ordered to pay fines in addition to other non-custodial awards. At the time of the interviews, they were serving prison sentences in default of payment of the fines.

From the case record, a 17 year old juvenile pleaded guilty to house breaking involving clothes valued at K86.50. The court⁶⁷ ordered her parents to pay a fine of K30.00. within three weeks. In addition, the girl was ordered to report to a probation officer every 14 days. The period within which she had to report was not specified on the case record. The imposition of the fine alone in this case, i.e, without a prison sentence did not contravene section 26(3) of the Penal Code seen above because the trial and sentencing of juveniles is not governed by the Penal Code. It is governed by the Juveniles Act as already seen (chapter 6), which sets out various types of punishment to be imposed on juveniles.

The two of the 100 interviewed offenders who were ordered to pay

fines were both convicted of theft. The first case involved a 41 year old unemployed man who pleaded guilty to shop lifting involving an oil filter worth K100.00. He claimed that he was a first offender and was ordered to pay a fine of K300.00. or to 3 months imprisonment in default of payment of the fine. In addition, he was awarded a 6 month prison sentence, suspended for 12 months.⁶⁸

The second case involved a 29 year old self-employed panel beater. In the interview, he claimed that he had carried out repairs worth K8,000.00 on the complainant's car. For some 8 weeks he was not paid. So he removed an engine worth K120,000.00 from the complainant's car as a way of facilitating payment. This apparently lawful explanation for his conduct was not upheld by the court and he was fined K500.00. or 6 months imprisonment in default of payment of the fine. In addition, he was given a 12 month prison sentence suspended for 18 months.⁶⁹

The court was perfectly entitled to make this order. But the only problem is that the implication of the suspended sentences was not clear in both cases. Either they were to run concurrently or consecutively with the prison sentence in default of payment of fines. In either case, the combination of the two orders brought about (or could bring about) undesirable consequences because of the offender's inability to pay. This places responsibility on the court to ensure that the ability of the offender to pay is carefully assessed before this kind of order is made. These were cases in which magistrates felt that the imposition of one day's imprisonment plus a fine would not constitute a sufficient

deterrent, but on the one hand, they felt that an immediate custodial sentence would be unjust owing to the circumstances of the case. The best course of action in these two cases would have been to impose a wholly suspended sentence.

7:4 Discharge

This study found that only 11 out of the 184 offenders were discharged. Of the 11 offenders, 5 were absolutely discharged and 6 were conditionally discharged. Seven of the 11 offenders were juveniles.

It has been pointed out by Cross that an absolute discharge is normally imposed to reflect the "triviality of the offence, the circumstances in which the offence was committed and factors relating to the offender"⁷⁰, while Milner has said that this order is appropriate where the "offence is so trivial or technical that repetition is unimportant"⁷¹. On the other hand, a conditional discharge is more appropriate in cases where the possibility that the offender will repeat his offence exists and the threat of possible punishment is designed to prevent it.

In this study it seemed impossible to isolate these factors in the cases in which discharge was ordered. That task was made even more difficult by the lack of authority on this disposal and the insufficient number of cases in which it was imposed. The main reason for the lack of authority is that cases in which discharge is ordered are unlikely to reach the High Court on appeal, by case stated or by a review process. It was, however, held in the case of The People v Zimba⁷² that an order for discharge can only

be made after conviction or a finding of guilty in the case of a juvenile offender.

In the case of 4 of the 5 offenders in whose respect an absolute discharge was ordered, it seems to have been imposed contrary to the decision in the Zimba case above. In three cases involving 3 offenders, the absolute discharge was imposed before conviction or a finding of guilty. In one of the three cases, two school boys, aged 20 and 17 years respectively, were jointly charged with burglary involving a sewing machine and clothes worth K3,000. The 20 year old offender pleaded guilty whilst the 17 year old offender pleaded not guilty. On the day the discharge order was made, the case was scheduled for a continued trial. Instead, the magistrate discharged the two defendants absolutely because "the probation officer was taking too long to prepare a social welfare report"⁷³. The right course of action would have been to dismiss the the case under section 199 of the Criminal Procedure Code.⁷⁴ As indicated above 6 of the 11 offenders were conditionally discharged. In the case of 3 of those offenders, the operational period of the discharge was 2 years instead of the legislative imposed maximum period of 12 months. The three offenders were convicted of house breaking and theft by servants.⁷⁵ The other three offenders (all of whom were juveniles), were found guilty of house breaking and theft by public servants. In all cases, the operational period of the discharge was 12 months.⁷⁶

It is difficult to draw any meaningful conclusions here owing to the small number of offenders who were given the discharge order. It was, however, clear that juvenile offenders were more likely

to be discharged than adult offenders. The scanty evidence available here seems to suggest that in the majority of cases, the discharge order was either imposed contrary to the provisions of the Penal Code or to established legal principle.

It seems that what can be achieved by a conditional discharge can equally be achieved by a suspended sentence. There is therefore need to specify clearly under what conditions each sentence should be ordered so as to avoid the apparent duplication. Since the suspended sentence is designed to reduce prison population there should be legislation to specify that only a sentence of, say 12 months imprisonment should be suspended. If this measure was adopted it could reduce the prison population by at least 18%, because the largest proportion of offenders sent to prison, (i.e, 64 or 18% of the 354 offenders) were sentenced to 12 months imprisonment. It could also mean that a case whose sentence is less than 12 months imprisonment would be dealt with by various non-custodial measures such as conditional discharge⁷⁷ or probation.

7:5 Probation

Opolot has shown that in British colonial Africa, probation was introduced after the Second World War, particularly for juvenile offenders whose rehabilitative needs were not met by imprisonment.⁷⁸ In the Zambian prisons, at that time, the classification of inmates was poor, with juveniles mixing freely⁷⁹ with adult offenders.

In this study, 13 offenders, who were all juveniles, were placed

on probation. Only 3 of the 13 juveniles pleaded not guilty and there is no evidence that they were treated differently from the rest. The highest number of juveniles, ie 7 of the 13, were placed on probation for having been found guilty of house breaking, while the offences of burglary, theft from a motor-vehicle and theft by servants accounted for 2 juveniles each and theft from the person accounted for one juvenile. The ages of the juveniles involved ranged from 11 to 19 years.

There was only one female among the 13 juveniles placed on probation. She was aged 11 years and pleaded guilty to house-breaking involving a 5 litre tin of cooking oil, then worth only K14.15 (it is now worth about K1000.00). The case record does not state what she said in mitigation of sentence, neither does it state the period of probation.

In respect of the rest of the juveniles, the duration of probation was 12 months. In the case of 5 of the 13 juveniles, their case records showed that the court had before it, a social welfare report, prepared by social welfare officers, who also act as probation officers. In some cases, the magistrates' remarks implied that their decision to place a juvenile on probation was influenced by the recommendation of the social welfare officers.

There is nothing in the Probation of Offenders Act which restricts its application to juvenile offenders only. This restriction has to do with the historical reasons already mentioned above and with the realities of the situation.

There is a serious shortage of probation officers in Lusaka and indeed in the country as a whole. As a matter of fact, probation service as a career does not exist in any organised form. In order not to seriously over-stretch the few available resources, courts have on their own initiative restricted probation to juvenile offenders. But even though this is the case, transport and other facilities remain inadequate with the result that juveniles on probation are poorly supervised. There is no possibility that within the near future any real investment will be made in the probation system, owing to the current economic ills. Yet the truth of the matter is that there are few or no alternatives to a well trained and well equipped probation service. The poor performance of the vigilante scheme set up in 1985 to assist the police in crime prevention, to be examined in detail in chapter 8, should make policy makers pause and re-think seriously the policy of short term solutions to deeply rooted problems of the criminal justice system. Until funding and training become available for the probation service, the role of probation as an alternative to imprisonment or to any other sentence will remain insignificant.

7:6 Extra Mural Penal Employment. (E.M.P.E.)

In this study only 3 offenders out of the 184 were ordered to do E.M.P.E. The first case involved a 20 year old garden "boy" who pleaded not guilty to theft by servants. He was a first offender and the property involved was 2 video cassettes and 2 Bibles altogether valued at K495. In mitigation, he pleaded for leniency as he was doing night school. He was ordered to do E.M.P.E. for one month. The magistrate specifically named the

place where work was to be done. He ordered the offender to report every day at 1400 hours at the Chikwa Road Magistrates' Courts⁸⁴ (one of the two Magistrates' Court sites in Lusaka). This was contrary to the laid down procedure. As seen in chapter 2, the Court does not have to go into the details of the place of work and the time of work. Those matters are to be left in the hands of a Local Authority.

The second case involved two adults who were jointly convicted of burglary and theft to which they pleaded guilty. They were aged 28 and 25 years respectively and both were unemployed. The property involved was K200. cash, clothes, shoes and plates, all valued at K3,845. In mitigation, the two offenders asked for leniency as they were first offenders. They were ordered to do E.M.P.E. for 3 months. The magistrate correctly ordered them to report to the office of the District Executive Secretary, but wrongly added that "they should assist in the filling up of pot holes in Lusaka".⁸⁵

The number of offenders ordered to perform E.M.P.E. may be small but there seems to be some considerable confusion on the part of magistrates about this disposal. In this study, a sample of 9 magistrates (out of a total of 12 magistrates in Lusaka) were asked why they rarely ordered E.M.P.E. Six of the 9 magistrates admitted that they did not know of its existence or gave responses which implied that they did not know that it existed.⁸⁶ It is probably understandable why E.M.P.E. is unknown by some magistrates in Lusaka. Unlike other orders and forms of punishment imposed by courts, E.M.P.E. is the only one

contained in the Prisons Act. All orders and other punishments are contained in the Penal Code or in other statutes creating specific criminal offences. During magisterial training most of the teaching material is derived from the Penal Code and from the Criminal Procedure Code.

Other shortcomings are inherent in E.M.P.E. itself. Firstly, the order is unsuitable for offenders in full-time employment because it requires the offender to perform the E.M.P.E. during normal working hours. If this order has to be a viable alternative to imprisonment (so as to alleviate some consequences of imprisonment such as loss of employment) it should ensure that offenders in full-time employment also benefit from it without risking loss of their jobs. This may be done by allowing an option to employed offenders to perform E.M.P.E. either during week-ends or outside normal working hours.

Secondly, as seen in chapter 2, E.M.P.E. does not cover female offenders. During the Parliamentary debates on its creation, the Government justified its exclusion of women on the ground that "it is not normal practice to allow female prisoners to come in
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the gaze of the public eye". The E.M.P.E. order is, however, very wide and Local Authorities are free to provide work for female offenders outside the "gaze of public eye" such as office cleaning and institutional catering. Like male offenders, female offenders are also sent to prison for failure to pay fines or
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other financial orders, though not necessarily for property offences. There is no reason why they should not be covered by the E.M.P.E. scheme.

Lastly, E.M.P.E., as seen in chapter 2, only covers offenders imprisoned for 3 months or less and those imprisoned for their failure to pay fines. As seen in Tables 33 and 34, the proportion of offenders sent to prison for three months for property offences is very small. The two Tables show that only 11 or 3% of the 354 imprisoned offenders were sentenced to three months or less. As seen earlier in this chapter, the imposition of fines on property offenders as sentences in their own right and not as additional orders to imprisonment is illegal under the Penal Code. Many property offenders therefore are outside the ambit of E.M.P.E. Later in this thesis (chapter 9), it will be suggested that E.M.P.E. should form the core of a new sentencing policy. Various ways of making this order more viable will be suggested.

In summmary, it may be said that non-custodial sentencing in Lusaka's magistrates' courts is much less articulated than imprisonment. The reason for this is that there is generally little authority on these sentences from the Appeal Courts because offenders in whose respect a non-custodial sentence is imposed rarely appeal against it as it is considered a lenient⁸⁹ sentence. Consequently, there is much confusion in the magistrates' courts not only about the range of the available non-custodial measures, but also about the legal criteria under which most of them should be imposed. This is particularly the case in relation to discharge, E.M.P.E., caning and the suspended sentence.

The scanty evidence available in this study suggests that non-

custodial sentences, such as caning, probation and discharge were more likely to be imposed on juvenile than on adult offenders.

The suspended sentence was more likely to be imposed on female offenders with young children. The plea tendered seemed to have been taken into account in reaching a decision to impose a custodial or a non-custodial sentence, but it was not taken into account in fixing number of strokes in the case of the caning order or the amount of the fine. In chapter 6, we saw that the plea tendered was not considered in fixing the sentence length. As Table 33 shows, 188 or 53% of the 354 imprisoned offenders pleaded guilty and 160 or 47% pleaded not guilty. The corresponding figures for suspended sentence were very close. It can be seen in Table 32 that 40 or 54% of those given suspended sentence pleaded guilty and 34 or 46% pleaded not guilty. On the other hand, a total of 80 or 73% of the 109 other offenders given various non-custodial sentences pleaded guilty and only 29 or 27% pleaded not guilty.

Conclusion.

The two chapters have examined the sentencing practice in magistrates' courts in Lusaka. It can be seen that magistrates there have a greater preference for custodial over non-custodial measures. It was found that 65.8% of offenders were sentenced to imprisonment. Smaller proportions of offenders sent to prison have been reported elsewhere. For instance, a study by Clegg, Harding and Whetton found that imprisonment constituted 58.4% of sentences awarded in Nairobi for Penal Code offences. A study conducted in 30 randomly selected magistrates' courts in England

found that between 1971-1975, on average only 7.4% of male offenders aged 21 years and over were sentenced to imprisonment⁹¹ for indictable offences. As will be seen in chapter 8, the preference for custodial sentences for property offenders is nation-wide.

It must be mentioned, however, that the possibility that property offenders may be fined, to some extent explains why fewer offenders, overall are sentenced to imprisonment in both Kenya and England. But it can also be argued that there are other non-custodial measures available for Lusaka magistrates to impose. We saw in chapter 2 that the penal policy of the colonial power was based on "punishment" rather than compensation, because the latter was regarded as not deterrent enough. It is both the absence of the power to impose fines as well as the colonial legacy which accounts for the excessive use of imprisonment by Lusaka magistrates' courts. This sentencing trend has led some complainants as well as offenders to believe that imprisonment is the standard punishment and that other sentences are exceptional. Thus in their mitigation remarks, most offenders had the prison sentence in mind as they feared for the plight of their families if they were sentenced to imprisonment. Similarly, a number of complainants mentioned the fact that they did not want the offender to go to prison as an added reason for the withdrawal of cases (chapter 5). It is the prevalence of imprisonment at the expense of compensation which in this study accounted for the withdrawal of some of those cases.

Factors which influenced the decision to impose a custodial

or a non-custodial sentence are difficult to isolate in individual cases. What looks certain is that the decision was not based on the personal circumstances of the offender as raised in mitigation. Evidence suggests, though not conclusively, that the youth of the offender, the intrinsic value of the property involved, the sex and family responsibilities of the offender, and the plea tendered were the major factors which influenced the decision to impose a non-custodial order. The award of non-custodial sentences such as discharge and E.M.P.E., however, were made without regard to the criteria laid down both in the Penal Code and the rulings of the appeal courts. This reflects the lack of supervision of the magistrate's courts by the High Court as required by law (see chapter 2).

It has also been shown that the relevant factual information available to the courts about offenders is severely limited. There are at least two explanations for this. First, the courts seriously lack resources such as social enquiry reports. The only information available is in the form of statements in mitigation of sentence from offenders themselves, most of whom are ignorant and inarticulate. Secondly, the fact that most defendants conduct their own defence means that most of the information available before courts is in favour of the prosecution. Magistrates in Lusaka therefore operate a very rigid sentencing regime, in which court business resembles a factory production line because offenders are not "sentenced" but are "processed", rather mechanically. The rigidity of the sentencing regime is one of the many imperfections hampering the smooth

administration of the criminal justice in Lusaka.

It must be mentioned that the problem of the inflexibility of sentencing and the supervision of the lower courts continue to tax the efforts of researchers and policy makers alike in both the United Kingdom and in the United States.

In the United Kingdom, measures to tackle this problem take the form of sentencing guidelines for magistrates and judges drawn by the Lord Chief Justice. Professor Ashworth has argued that this practice is not suitable for the supervision of the 1,000 judges and some 27,000 magistrates throughout England and Wales. He is of the view that the guidelines approach is narrow in the sense that the guidelines are "fashioned solely from a judicial perspective and informed only by the judicial outlook on the aims and effectiveness of sentencing"⁹². Professor Ashworth therefore favours the establishment of a Sentencing Council or Commission which should be composed of a senior judge, together with a circuit judge and a recorder. Other members of the sentencing council should be a lay magistrate, a stipendiary magistrate, a justice's clerk, a prison governor, a chief probation officer, a senior civil servant and an academic. The first task of the sentencing council would be to establish the sentencing aims and policies. The second task would then be to review the sentencing levels for the crimes most frequently dealt with by courts so as to construct proper sentencing guidelines for each of those offences. Sentencing guidelines, however, cannot cover all situations. Professor Ashworth's proposal therefore allows room for judicial discretion to deal

with unforeseen situations, thereby maintaining the essential balance between consistency and flexibility in sentencing.

Judges in England and Wales, however, are strongly opposed to the establishment of a sentencing council. They are of the view that such an arrangement "would be seen as other people taking over⁹³ the judge's role". They are strongly in favour of the sentencing guidelines. The debate continues but it looks unlikely that a sentencing council will be established in England and Wales. As Milner has observed: "If there is dissatisfaction with sentencing by judges, we must try to seek improvements not by replacing the⁹⁴ judges but by making them better equipped to carry out the task".

In the United States, measures to improve the quality of sentencing are in the form of sentencing councils and direct participation in the sentencing process by victims themselves. In the case of sentencing councils, which function as advisory bodies, the notable examples are in New York and Chicago. They are composed of judges who meet with their colleagues before imposing a sentence "in order to learn what sentence other judges⁹⁵ would impose if they were the sentencing judge". In both New York and Chicago, judges hold meetings weekly and before each meeting participating judges receive a pre-sentencing report. The pre-sentencing report contains a description of the offence and background information on the offender which are discussed at the meeting of the sentencing council. At the meeting, the sentencing judge arrives at the sentence in his own discretion after hearing the views of other judges present. The sentencing councils have enabled judges to formulate sentencing guidelines and to foster

a common approach to similar problems. They have also created awareness among judges of the existing range of sentencing⁹⁶ alternatives. Another advantage of sentencing councils is that⁹⁷ they have reduced sentence disparity by some 10%.

The most recent innovation is victim's participation in the sentencing process, practised in most states and in federal courts across the United States through what is called Victim⁹⁸ Impact Statement (VIS). In 1982, the President's Task Force on Victims of Crime felt that it was not possible for a judge to arrive at a balanced sentence without hearing the views of the⁹⁹ person victimised. That marked the birth of the victim impact statement. As the name suggests, the victim impact statement is a statement made by the victim of the offence to the judge to be considered in sentencing. The statement includes a description of the exact harm, financial and other consequences of crime suffered by the victim. It also includes what the victims feels is the adequate sentence.

This practice has rendered criminal process in the United States more democratic and more responsive to public feelings on crime. Victims now see themselves as "parties" to the dispute and not just as witnesses or complainants. But despite the existence of this right, less than 10% of victims choose to exercise it. The existence of the victim impact statement procedure nevertheless, symbolises the desire of the American people to stand up to the challenges of criminal justice. The American Bar Association is, however, opposed to this practice because, in its opinion, it opens the courts to public pressure and could result in courts

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imposing stiffer sentences.

It is suggested that sentencing guidelines as practised in England and Wales would not be suitable for Lusaka or for Zambia as a whole. This is because there is no strict system of supervision of magistrates' courts by the higher courts.¹⁰¹

The establishment of a sentencing council on the same lines as New York and Chicago models would be impractical because it would bring an added burden to the already over-stretched and over-worked magistrates. It would also result in more delays in hearing cases. Besides, magistrates in Lusaka are not in the habit of consulting each other over difficult cases as evidence¹⁰² in this study shows. Professor Ashworth's model would equally be unsuitable for Zambia mainly because of the lack of manpower and other resources. Direct participation of victims in sentencing through victim impact statement is very similar to the African system of public participation in dispute settlement (see chapter 2). In a later section of this thesis (chapter 9) we shall argue that if this system was to be revived, it would bring about popular acceptance of the criminal process.

It is suggested that what is needed for Lusaka and indeed for Zambia is first and foremost to formulate a flexible sentencing policy that would shift emphasis from custodial to non-custodial sentences. Once that has been done, the second stage should be to formulate rules and procedures that would ensure that magistrates implement the new sentencing policy. Later in this thesis we shall see how this could be achieved (chapter 9).

Notes

- 1 See for instance, Cross (Sir Rupert), op cit, 57.
- 2 Suspended sentence is ordered under section 16 of C.P.C. There is some confusion about what a suspended sentence really is. For instance A.E.Bottoms says that it is not clear whether it is a custodial sentence or non-custodial sentence, see his "The Suspended Sentence in England", 21 Brit.Jo.Crim, 16 (1981). D.A.Thomas has remarked that there is a "penological ambiguity", about the suspended sentence, see [1975] Crim.L.R., 401. A.Milner says it is "theoretically a sentence of imprisonment...", see op cit, 1972, 409 (foot note number 69). And there seems to be some disagreement on whether the suspended sentence should be discussed under imprisonment or under non-custodial measures in the literature. Thus while Cross, op cit, discusses it under "Types of Prison Sentences", Thomas discusses it under "Non-custodial Measures", see op cit, 1980.
- 3 See Cross, ibid, 57.
- 4 See D.A.Thomas, op cit, 245.
- 5 Op cit, 57.
- 6 [1977] Z.R. 234.
- 7 Massissani V The People, foot note 6, at 239 per SILUNGWE, CJ.
- 8 [1978] Z.R. 265.
- 9 Munungwa V The People, foot note 8, at 265 per BARON, DCJ. See also Mubanga V The People, [1973] Z.R. 186 where DOYLE, CJ said that: "...the purpose of a suspended sentence is to ensure that the offender behaves himself in future", at 187.
- 10 Mwachilabanji, 1PB-147 (1988).
- 11 Sitwala, SSP-58 (1988).
- 12 Jumbe, 3PB-48 (1989).
- 13 Phiri, 5P-39 (1988).
- 14 Musabula, 3PB-209 (1989).
- 15 That section gives courts the power to order that an accused person be medically examined for the purpose of ascertaining any matter which in the opinion of the court is material to the proceedings before it.
- 16 Phiri, 2P-282 (1986).
- 17 Lupunga, 3PB-204 (1989).

18 [1973] Z.R. 186.

19 Mubanga V The People, foot note 18, at 187 per DOYLE C.J.

20 Advisory Council on the Penal System: Sentences of Imprisonment: A Review of Maximum Penalties, 1978, (HMSO) para 268, quoted by Cross, op cit, 61-62. But Thomas feels that as a general rule, it is undesirable that an offender should be subjected at the same time to a custodial and a suspended sentence, op cit, 1908, 242.

21 Kampanga, 2P-33 (1989).

22 Mukasa, 3P-163 (1985).

23 Simukoko, PB-188 (1986).

24 See Cross, op cit, 57.

25 Mulubwa, SP-113 (1987)

26 Bwalya and Kakoma, SP-59 (1988). The other case involved 2 co-accused persons: a 20 year old man and a 16 year old juvenile who were convicted of burglary and theft. Property involved was clothes, bedding a TV set and a fan, all valued at K4,050. They pleaded not guilty and the case record does not contain any plea in mitigation. They were both first offenders and were sentenced to 8 months imprisonment suspended for 18 months. In addition, they were ordered to receive 10 strokes of a cane each. Maciani and Zulu, 2PB-148 [1985].

27 King, [1970] 1 WLR 1016.

28 A.E.Bottoms, "The Advisory Council and the Suspended Sentence", [1978] Crim.L.R., 441.

29 See for example Bwalya and Kakoma, foot note 26.

30 Musowa, 3P-243 (1985)

31 Kangumu, SP-27 (1988)

32 See for instance Cross, op cit, 60; A E Bottoms, op cit, 1979, 439 and op cit, 1981, 6.

33 Bottoms has shown that unlike in Continental Europe, the suspended sentence in England was created in a Common Law system which already had both the conditional discharge and probation. From the start, argues Bottoms, the relationship between these measures has always been a problem, op cit, 1981, 19.

34 The effect of the suspended sentence on prison population in Zambia may only be fully assessed by a study comparing the use of immediate imprisonment and the suspended sentence during the period prior to 1957 (when the suspended sentence was introduced)

and the period after 1957.

35 See for example, R.F.Sparks, "The Use of Suspended Sentence", [1971] Crim.L.R., 384, 387; A.E.Bottoms, op cit, 1979, 483. Bottoms has also shown that in the Crown Court, there was a sharp decline in the proportionate use of probation in 1973-74 as against 1971-72, notably for female cases and at the same time, the use of suspended sentences increased, op cit, 1981, 134. Cross has also pointed out that suspended sentences flourish at the expense of fines and to a lesser extent , of probation, op cit, 59.

36 [1973] Z.R. 31.

37 Alakazamu V The People, foot note 37, at 35 per BARON J.P.

38 Alakazamu V The People, foot note 37. See also Malaya V The People, [1973] Z.R. 230.

39 [1984] Z.R. 19.

40 Berejena V The People, foot note 39, at 21 per SILUNGWE C.J.

41 Mvula, [1978] Z.R. 80, at 81. Caning as an alternative to imprisonment prevails over mandatory prison sentences in so far as juvenile offenders are concerned. Thus in one case a 17 year old boy was found guilty of stock theft involving 2 oxen valued at K6,000. which were recovered. In mitigation, he said that he was looking after his grandmother. He was ordered to receive 5 strokes of a cane, despite the existence of a 5 year mandatory prison sentence for stock theft. Sikota, SP-26 [1988].

42 Chipembele, SP-75 (1984).

43 Sikapizia, SP-354 (1986).

44 Chola and Mofya, SP-171 (1985).

45 Sakala, Alick, 3PB-545 [1986]. He was convicted of theft by servants to which he pleaded guilty. He was a first offender and in mitigation, he said nothing. Property involved was one chicken worth K17.

46 Shanyimba, 2PB-231 (1987).

47 Komiti, Mwamba and Ngoma, 2PB-83 (1987).

48 See for instance, Chishimba, interviewed on 13th. September, 1989 sentenced to 4 years and 6 months imprisonment. The burglary was committed in a group of 3 accomplices. Compare with Simukoko, interviewed on 10th. October, 1989. sentenced to 18 months imprisonment for burglary he committed alone. See also D.A.Thomas, op cit , 1980, 159.

49 Mulenga, P, interviewed on 11th September, 1989.

50 W.Clifford, Juvenile Delinquency in Northern Rhodesia, Lusaka, 1963, 27.

51 A.Milner, op cit, 1972, 315.

52 O.K.Rugimbana, "Various Aspects of the Imprisonment System in East Africa", (24) East African Law Journal 22 (1966).

53 L.K.Jakande, "Consequences of Remand and Conviction", in A.A.Adeyemi (ed), op cit, Lagos, 1977, 235.

54 Op cit, 1972, 100.

55 Steven Ncube v The State, Brown Tshuma v The State, Innocent Ndhlovu v The State, Judgments delivered by the Supreme Court of Zimbabwe on 6th October and 14th December, 1987. See The Commonwealth Law Bulletin Vol 14 No. 2. April 1988, 593-595.

56 Felonies are defined " as offences punishable without proof of previous conviction, with death or with imprisonment with hard labour for 3 years or more". Section 4 of the Penal Code.

57 See, for instance, Genese, [1976] 63 Cr.App.Rep.152.

58 IV N.R.L.R, 84. [1947].

59 [1979] Z.R.150.

60 In one case, for example, a 25 year old farm worker pleaded guilty to theft by servants involving irrigation pipes worth K10,000.00. In mitigation, he simply asked for mercy. He was sentenced to one day's imprisonment plus a fine of K200.00. or 4 months simple imprisonment in default of payment of the fine. The magistrate when imposing the sentence remarked that: "all the property involved was recovered".

61 Section 28(a) of the Penal Code.

62 This is the position in England, for example. See Thomas, op cit, 1980, 321.

63 Thomas, ibid, 322.

64 Ibid, 323.

65 P.Softley, Fines in Magistrates' Courts, Home Office Research Study No. 46, London, HMSO (1978), 11.

66 Ibid.

67 Banda, 3P-245 (1988). The Juveniles Act empowers courts to order parents or guardians to pay fines, damages or costs when a finding of guilty has been made against a juvenile. The court must, however, be satisfied that the parent or guardian conduced to the commission of the offence by neglecting to exercise due

care of the juvenile. See section 74 of the Act.

68 Kabwe, interviewed on 14th. August, 1989.

69 Yeyenga, interviewed on 13th. October, 1989.

70 Op cit, 9. Thomas has pointed out that absolute discharge may be imposed in "offences committed in circumstances of minimal culpability and substantial mitigation", op cit, 1980, 226.

71 Op cit, 1972, 179-180.

72 [1976] Z.R. 86.

73 Chamuchita and Kambanjela, 1PB-19 (1988). See also Zulu and Phiri.M, 2PB-286 (1987).

74 That section gives courts the power to dismiss a case if the complainant (in this case the state) fails to appear at the appointed time after being properly summoned as was seen in chapter 5.

75 Ngulube, a 44 year old supervisor with Zambia Forestry Industry Corporation, pleaded guilty to theft by servants involving 8 pieces of timber valued at K2,496.43. In mitigation he said that he was a widower with 8 children to look after. He was conditionally discharged for 2 years. SSP-88 (1989).

Mbewe, a 24 year old man, pleaded guilty to theft by servants involving one blue overalls and one pair of boots, all valued at K313. In mitigation, he told the court that he had his aged mother to look after. He was conditionally discharged for 2 years. 2P-52 (1987).

Akufa, a 16 year old school boy pleaded guilty to house breaking involving clothes, bedding, shoes and one radio, all valued at K171. In mitigation, he said he was attending school. He too was conditionally discharged for 2 years. 3P-328 (1984).

76 Mwale, SP-497 (1987), Sakala.M, PB-29 (1989) and Moyo, 3P-307 (1987).

77 Thomas has suggested that sentences should only be suspended if they are above six months and that "an offence which does not justify a sentence of that length is not one that cannot equally satisfactorily be dealt with by other non-custodial measures", see, his "Developments in Sentencing 1964-1973", [1974] Crim.L.R, 685, 688.

78 J.S.E.Opolot, "Alternatives to Imprisonment in the New African States", 36 International Review of Criminal Policy, 19, 22 (1980). In the case of French Africa, such as the Congo, probation did not exist for adult offenders, see 22.

79 W.Clifford reports that in 1938, a Mr.T.C.Flynn, Secretary for the then Southern Rhodesia Department of Justice and Director of Prisons for Southern Rhodesia, visited Northern Rhodesia and

reported on the prison system. He found that male, female prisoners and juvenile offenders were all accommodated in the same prisons with inadequate segregation. See op cit, 1969, 241.

80 See Table 30.

81 Chimanga, 3P-376 (1984).

82 The social welfare report contains the life history of the juvenile and information about his home surroundings. It also contains a recommendation concerning the possible disposal of the case.

83 See for instance, Mwansa, 1PB-81 (1988), Mambwe, 1PB-176 (1988), Miti, SSP-86 (1986).

84 Phiri,S, 2P2-77 (1988).

85 Musonda and Sikwa, 2P2-211 (1989).

86 One magistrate responded in this way: "I think this is mainly due to the ignorance of its existence by magistrates". Another said "The courts do not have enough manpower to supervise offenders ordered to do E.M.P.E." As seen above, the responsibility to find work and to supervise offenders does not rest on the courts but on the Local Authorities.

87 Zambian Hansard No.4 Debates of the Second Session [Resumed] of the First National Assembly. 13th July-22nd September, 1965. 1259-1260. Columns 2 and 1.

88 In 1985 for instance, 91 female and 802 male offenders were sent to various prisons nation-wide for failure to pay fines (for all offences). See Zambia Prisons Department Annual Report, 1985, 7.

89 Other writers elsewhere have made a similar observation about the development of the principles of sentencing in relation to non-custodial measures. See for instance, M.Wasik and A.von Hirsh, "Non-Custodial Penalties and the Principles of Desert", [1988] Crim.L.R. 555.

90 I.Clegg et al, op cit, 8. This study also shows that nation-wide, 64.7% of offenders were sentenced to imprisonment in 1986 in Zambia while in Kenya only 48.6% of offenders were sentenced to imprisonment.

91 Sentencing Practice in Magistrates' Courts, Home Office Study No. 56. HMSO, London, 7 (Table 1).

92 A.Ashworth, Custody Reconsidered: Clarity and Consistency in Sentencing, (Centre for Policy Studies), London, 1989, 22. Professor J.S.Read also supports the sentencing council, personal communication, 28th. November, 1991.

93 Lord Justice Glidewell, The Independent, 11th. July, 1989,

19.

94 Op cit, 1972, 388-389.

95 S.S.Diamond and H.Zeisel, "Sentencing Councils: A Study of Sentence Disparity and its Reduction", 43 University of Chicago Law Review, 109, (1975).

96 A.W.Campbell, op cit, 312.

97 Diamond and Zeisel, op cit, 144.

98 E.Erez, "Victim Participation in Sentencing: Rhetoric and Reality", Journal of Criminal Justice, Vol.18, 19. (1990).

99 Ibid, 22. The President's Task Force on Crime proposed an amendment to the Constitution so as to incorporate Victim Impact Statement (VIS) as part of the Sixth Amendment which guarantees the right against self-incrimination. The proposed Amendment read as follows: "Likewise, the victim in every criminal proceeding shall have the right to be present and to be heard at all critical stages of the judicial proceedings".

100 Ibid, 24.

101 From time to time the Registrar of the High Court issues circulars to magistrates, containing sentencing guidelines. Unfortunately the materials gathered for this study did not throw any light on this.

102 Seven of the nine magistrates who completed the questionnaire in this study said that they did not consult their colleagues before sentencing.

TABLE 28 SENTENCE AGAINST CHARGE. (case Records).

		Charge					
		0	1	2	3	4	5
		-----	-----	-----	-----	-----	-----
S	1	5	42	107	15	8	41
e	2	0	3	37	14	0	7
n	3	0	1	2	0	0	2
t	4	0	0	12	1	0	2
e	5	0	8	13	1	1	4
n	6	0	0	2	1	0	0
c	7	0	0	0	0	0	0
e	8	0	0	1	0	0	0
ALL		5	54	174	32	9	56

	6	7	8	ALL
	-----	-----	-----	-----
1	86	45	5	354
2	9	4	0	74
3	1	7	0	13
4	2	0	0	17
5	19	18	1	65
6	4	4	0	11
7	0	1	0	1
8	2	0	0	3
	123	79	6	538

Key:

Sentence

Imprisonment.....	1
Suspended Sentence.....	2
Probation.....	3
One Day's Imprisonment Plus a Fine.....	4
Caning.....	5
Discharge.....	6
Fine.....	7
Extra Mural Penal Employment.....	8

Charge

Theft of a Motor-vehicle.....	0
Theft from the Person.....	1
Theft by Servants.....	2
Theft by Public Servants.....	3
Stock Theft.....	4
Theft from a Motor-vehicle.....	5
Burglary.....	6
House Breaking.....	7
Robbery.....	8

TABLE 29 SENTENCE AGAINST STATEMENT IN MITIGATION. (Case Records).

		Mitigation					ALL
		0	1	2	3	4	
		-----	-----	-----	-----	-----	-----
S	1	68	143	33	20	90	354
e	2	17	42	4	2	9	74
n	3	5	0	0	5	3	13
t	4	2	5	1	1	8	17
e	5	16	11	4	6	28	65
n	6	4	2	0	1	4	11
c	7	0	0	0	0	1	1
e	8	0	0	0	1	2	3
ALL		112	203	42	36	145	538

Key:

Sentence

Imprisonment.....	1
Suspended Sentence.....	2
Probation.....	3
One Day's Imprisonment Plus a Fine.....	4
Caning.....	5
Discharge.....	6
Fine.....	7
Extra Mural Penal Employment.....	8

Statement in Mitigation.

Nothing Said or Recorded on the Case Record.....	0
Plight of the Family.....	1
Illness.....	2
Loss of Employment.....	3
Plea for Mercy.....	4

TABLE 30 AGE AGAINST SENTENCE (Case Records) .

		Sentence					
		1	2	3	4	5	6
		-----	-----	-----	-----	-----	-----
A g e	00	4	0	0	0	0	0
	11	0	0	2	0	0	0
	13	0	0	0	0	2	0
	14	0	0	3	0	2	0
	15	0	0	3	0	3	1
	16	0	0	1	0	10	3
	17	2	0	3	0	10	1
	18	6	0	0	0	10	2
	19	36	6	1	2	4	0
	20	23	5	0	3	4	1
	21	36	3	0	1	2	0
	22	23	6	0	1	4	0
	23	27	7	0	1	3	1
	24	23	3	0	1	2	1
	25	26	4	0	1	2	0
	26	19	5	0	2	0	0
	27	11	0	0	1	1	0
	28	10	3	0	0	0	0
	29	16	5	0	0	1	0
	30	15	2	0	1	2	0
	31	7	4	0	1	1	0
	32	14	3	0	0	0	0
	33	5	1	0	0	1	0
	34	11	1	0	1	0	0
	35	4	0	0	0	0	0
	36	5	2	0	0	0	0
	37	3	1	0	0	1	0
	38	2	0	0	0	0	0
	39	2	2	0	0	0	0
	40	5	1	0	0	0	0
	41	3	0	0	0	0	0
	42	2	1	0	0	0	0
	43	2	2	0	0	0	0
	44	1	1	0	0	0	1
	45	1	2	0	0	0	0
	46	1	0	0	0	0	0
	47	1	0	0	0	0	0
	48	2	0	0	0	0	0
	49	1	0	0	0	0	0
	50	1	1	0	0	0	0
	51	0	1	0	0	0	0
	52	1	0	0	0	0	0
	53	1	0	0	0	0	0
	55	0	1	0	0	0	0
	56	0	1	0	0	0	0
	57	0	0	0	1	0	0
	60	1	0	0	0	0	0
	67	1	0	0	0	0	0
ALL		354	74	13	17	65	11

TABLE 30 CONTINUED

	7	8	ALL
	-----	-----	-----
00	0	0	4
11	0	0	2
13	0	0	2
14	0	0	5
15	0	0	7
16	0	0	14
17	1	0	17
18	0	0	18
19	0	0	49
20	0	1	37
21	0	0	42
22	0	0	34
23	0	0	39
24	0	0	30
25	0	1	34
26	0	0	26
27	0	0	13
28	0	1	14
29	0	0	22
30	0	0	20
31	0	0	13
32	0	0	17
33	0	0	7
34	0	0	13
35	0	0	4
36	0	0	7
37	0	0	5
38	0	0	2
39	0	0	4
40	0	0	6
41	0	0	3
42	0	0	3
43	0	0	4
44	0	0	3
45	0	0	3
46	0	0	1
47	0	0	1
48	0	0	2
49	0	0	1
50	0	0	2
51	0	0	1
52	0	0	1
53	0	0	1
55	0	0	1
56	0	0	1
57	0	0	1
60	0	0	1
67	0	0	1
	1	3	538

TABLE 30 CONTINUED

Key:

Imprisonment.....	1
Suspended Sentence.....	2
Probation.....	3
One Day's Imprisonment Plus a Fine.....	4
Caning.....	5
Discharge.....	6
Fine.....	7
Extra Mural Penal Employment.....	8

TABLE 31 CHARGE AGAINST PLEA.. (Case Records).

		Plea			
		0	1	2	ALL
		-----	-----	-----	-----
C	0	0	3	2	5
h	1	0	21	33	54
a	2	0	106	68	174
r	3	0	16	16	32
g	4	0	3	6	9
e	5	0	30	26	56
	6	0	72	51	123
	7	1	56	22	79
	8	0	1	5	6
ALL		1	308	229	538

Key:

Charge

Theft of a Motor-vehicle.....	0
Theft from the Person.....	1
Theft by Servants.....	2
Theft by Public Servants.....	3
Stock Theft.....	4
Theft from a Motor-vehicle.....	5
Burglary.....	6
House Breaking.....	7
Robbery.....	8

Plea.

Not Stated on the Case Record.....	0
Guilty.....	1
Not Guilty.....	2

TABLE 32 SENTENCE AGAINST PLEA TENDERED (Case Records).

		Plea			
		0	1	2	ALL
		-----	-----	-----	-----
S	1	0	188	166	354
e	2	0	40	34	74
n	3	0	10	3	13
t	4	0	11	6	17
e	5	0	49	16	65
n	6	1	7	3	11
c	7	0	1	0	1
e	8	0	2	1	3
ALL		1	308	229	538

Key:

<u>Sentence</u>	
Imprisonment.....	1
Suspended Sentence.....	2
Probation.....	3
One Day's Imprisonment Plus a Fine.....	4
Caning.....	5
Discharge.....	6
Fine.....	7
Extra Mural Penal Employment.....	8

<u>Plea</u>	
Not Stated on the Case Record.....	0
Guilty.....	1
Not Guilty.....	2

TABLE 33 SENTENCE LENGTH (IN MONTHS) AGAINST PLEA TENDERED
(Case Records).

		Plea		
		1	2	ALL
		-----	-----	-----
P	01	2	0	2
r	03	9	0	9
i	04	1	1	2
s	05	0	4	4
o	06	26	21	47
n	08	1	4	5
	09	20	31	51
	10	2	1	3
	12	33	31	64
	15	6	3	9
	16	2	0	2
	18	24	22	46
	20	0	2	2
	24	30	21	51
	30	2	1	3
	36	21	14	35
	48	1	2	3
	60	8	7	15
	84	0	1	1
ALL		188	166	354

Key:
Guilty.....1
Not Guilty.....2

TABLE 34 SENTENCE LENGTH (IN MONTHS) AGAINST CHARGE (Case Records) .

		Charge					
		0	1	2	3	4	5
		-----	-----	-----	-----	-----	-----
P r i s o n	01	0	0	2	0	0	0
	03	0	0	7	0	0	2
	04	0	1	1	0	0	0
	05	0	0	0	2	0	2
	06	0	10	19	1	0	5
	08	0	0	3	1	0	0
	09	0	6	22	1	0	6
	10	0	0	0	0	0	0
	12	0	7	19	4	0	11
	15	0	0	3	0	0	2
	16	0	0	0	0	0	0
	18	0	6	11	3	0	3
	20	0	0	0	0	0	0
	24	0	9	14	3	0	3
	30	0	0	0	0	0	0
	36	0	1	6	0	0	7
	48	0	2	0	0	0	0
	60	4	0	0	0	8	0
	84	1	0	0	0	0	0
ALL		5	42	107	15	8	41

	6	7	8	ALL
	-----	-----	-----	-----
01	0	0	0	2
03	0	0	0	9
04	0	0	0	2
05	0	0	0	4
06	10	2	0	47
08	1	0	0	5
09	10	6	0	51
10	3	0	0	3
12	11	10	2	64
15	3	1	0	9
16	0	2	0	2
18	11	11	1	46
20	2	0	0	2
24	13	9	0	51
30	3	0	0	3
36	16	4	1	35
48	1	0	0	3
60	2	0	1	15
84	0	0	0	1
	86	45	5	354

TABLE 34 CONTINUED..

Key:

Theft of a Motor-vehicle.....	0
Theft from the Person.....	1
Theft by Servants.....	2
Theft by Public Servants.....	3
Stock Theft.....	4
Theft from a Motor-vehicle.....	5
Burglary.....	6
House Breaking.....	7
Robbery.....	8

TABLE 35 LENGTH OF SUSPENDED SENTENCE (IN MONTHS) AGAINST CHARGE
(Case Records) .

		Charge					
		0	1	2	3	4	5
		-----	-----	-----	-----	-----	-----
S	00	0	0	0	0	0	0
u	03	0	0	5	0	0	0
s	04	0	0	1	0	0	1
p	06	0	0	7	4	0	5
e	08	0	0	1	0	0	0
n	09	0	1	8	5	0	0
d	12	0	1	9	3	0	1
e	18	0	1	2	1	0	0
d	24	0	0	3	1	0	0
	36	0	0	1	0	0	0
ALL		0	3	37	14	0	7

		6	7	8	ALL
		-----	-----	-----	-----
S	00	0	0	0	0
u	03	3	0	0	8
s	04	0	0	0	2
p	06	1	0	0	17
e	08	2	0	0	3
n	09	0	0	0	14
d	12	2	2	0	18
e	18	1	1	0	6
d	24	0	1	0	5
	36	0	0	0	1
ALL		9	4	0	74

Key

- Theft of a Motor-vehicle.....0
- Theft from the Person.....1
- Theft by Servants.....2
- Theft by Public Servants.....3
- Stock Theft.....4
- Theft from a Motor-vehicle.....5
- Burglary.....6
- House Breaking.....7
- Robbery.....8

TABLE 36 THE AMOUNT OF FINE ORDERED (IN KWACHA) AGAINST CHARGE FOR ONE DAY'S IMPRISONMENT PLUS A FINE (Case Records).

		Charge				
		2	3	5	6	ALL
		-----	-----	-----	-----	-----
F	0100	1	0	0	0	1
i	0200	3	0	1	0	4
n	0300	2	0	0	2	4
e	0400	1	1	0	0	2
	0500	3	0	1	0	4
	1000	1	0	0	0	1
	2000	1	0	0	0	1
ALL		12	1	2	2	17

Key:

Theft by Servants.....2
Theft by Public Servants.....3
Theft from a Motor-vehicle.....5
Burglary.....6

TABLE 37 RELATIONSHIP BETWEEN THE VALUE OF PROPERTY STOLEN AND THE AMOUNT OF FINE ORDERD (IN KWACHA) FOR ONE DAY'S IMPRISONMENT PLUS A FINE. (Case Records).

		Fine					
		0100	0200	0300	0400	0500	1000
		-----	-----	-----	-----	-----	-----
V	000260	0	0	2	0	0	0
a	000534	0	0	0	1	0	0
l	000700	0	0	0	0	0	1
u	001200	1	0	0	0	0	0
e	001300	0	0	0	0	1	0
	002500	0	1	0	0	0	0
	003000	0	0	0	0	1	0
	004801	0	0	0	0	2	0
	006300	0	0	0	1	0	0
	010000	0	1	0	0	0	0
	013958	0	0	2	0	0	0
	026314	0	2	0	0	0	0
	060000	0	0	0	0	0	0
ALL		1	4	4	2	4	1

	2000	ALL
	-----	-----
000260	0	2
000534	0	1
000700	0	1
001200	0	1
001300	0	1
002500	0	1
003000	0	1
004801	0	2
006300	0	1
010000	0	1
013958	0	2
026314	0	2
060000	1	1
ALL	1	17

TABLE 38 OCCUPATION AGAINST THE AMOUNT OF THE FINE ORDERED FOR ONE DAY'S IMPRISONMENT PLUS A FINE (Case Records).

		Fine					
		0100	0200	0300	0400	0500	1000
		-----	-----	-----	-----	-----	-----
O	00	0	0	0	0	1	0
c	05	1	0	0	0	0	0
c	09	0	2	1	2	3	1
u	13	0	1	1	0	0	0
p	15	0	0	1	0	0	0
a	19	0	1	0	0	0	0
t	27	0	0	0	0	0	0
i	88	0	0	1	0	0	0
o	ALL	1	4	4	2	4	1
n							

	2000	ALL
	-----	-----
00	0	1
05	0	1
09	0	9
13	0	2
15	0	1
19	0	1
27	1	1
88	0	1
ALL	1	17

Key::

Unemployed.....00
Security Guard.....05
General Worker.....09
Driver.....13
Machine Operator.....15
Electrician.....19
Service Worker.....27
Student.....88

CHAPTER 8

THE PREVENTION OF PROPERTY CRIME: THE ROLE OF THE CRIMINAL JUSTICE SECTOR AND MEMBERS OF THE PUBLIC.

8:1 The Concept of Crime Prevention.

According to Brantingham and Faust prevention is one of the most "over-worked" and the least understood concepts in criminology today. They define it as "...any activity by any individual or a group, public or private, that precludes the¹ increase of one or more criminal acts". The problem with this definition is that it does not qualify "any activity by any individual". This implies that personal and group retaliation such as "instant justice" mobs are included in this definition. In the context of this study, that is unacceptable and this chapter argues that the stamping out of "instant justice" mobs should be one of the aims of crime prevention.

The American National Prevention Institute defines crime prevention as "...the anticipation, recognition and appraisal of a crime risk and the initiation of some action to remove or² reduce it." This definition is somewhat vague as it gives no indication as to what action should be taken (and by whom) to reduce crime. Besides, the criticism levelled against the above definition should equally apply to this one.

The definition adopted by the British Home Office is more helpful. The Home Office regards crime prevention as involving three strategies, i.e, the reduction of opportunities which bring about crime, the improvement of social environment for both the offender and the potential offender and the application of

3
sanctions. Unlike the two definitions above this one does not seem to include "instant justice" mobs. In addition, it expressly brings in an important aspect of crime prevention-sanctions. But it does not specify what institutions should bring about improvements in the material conditions of both the
4
offender and the potential offender.

Some writers have argued that a definition of crime prevention which combines prevention and control is too broad to have any significant value. Thus Edelman and Rowe have drawn a distinction between the two: "prevention" meaning steps taken before a crime is committed and "control" meaning steps taken after a crime has
5
been committed. This view does not seem to have a wide appeal and a viable crime prevention strategy should combine prevention and
6
control measures.

In this study crime prevention is defined as:

The taking of legitimate and calculated action by the criminal justice sector, social services sector and the citizen groups to reduce the risk of crime.⁷

The use of the term "legitimate" excludes "instant justice" mobs and poorly organised vigilantes as possible crime control strategies. The term "calculated" implies that crime prevention activities should be planned and subjected to constant appraisal.

This definition seeks to link crime prevention activities to the broad policy directions in the over-all development strategies of governmental, quasi-governmental and non-governmental organizations. This approach takes the sociological crime prevention model which lays more emphasis on the modification of

the social conditions of both the offender and the potential
8
offender. It also incorporates what is generally referred to as
crime prevention through environmental design in as far as it
envisages citizen participation in making their environment safer
and in as far as it seeks to incorporate the methods used in the
commission of offences in the formulation of crime prevention
9
strategy

8:2 The Police.

We saw in chapter 4 that the police play a marginal role in the
identification and "arrest" of suspects. Their role in crime
prevention is equally marginal.

At the moment, the police have two specialised units, the anti-
robbery squad (also known as the "flying squad") and the stock
theft squad. The secrecy surrounding the establishment of these
units (especially the anti-robbery squad) made it impossible to
investigate them in the course of field work. It is however,
generally known that the anti-robbery squad, which is well
equipped through material support by the business community and
individuals, has had some "success" in eliminating known
10
criminals by the officially tolerated shoot to kill policy.

On the other hand, the stock theft squad has been plagued with
problems from its inception. Cattle owners in the areas where it
operates (especially in the Southern Province) have always
shunned the squad in preference for compensatory settlements at
the village level. In other words, the stock theft squad has not
11
significantly changed the long tradition of dispute settlement.

As seen in chapter 5, the nature of remedies available in the magistrates' courts force many complainants to withdraw cases before the courts. The other factor which discourages people from reporting stock theft cases is the distance which they have¹² to travel to the nearest police station.

By the nature of their functions, the police are expected to take a leading role in crime prevention. They are clearly not doing so. As seen in chapter 5 they are faced with severe operational problems especially transport. There is also a serious problem of manpower which is exacerbated by its apparent misplacement. At Lusaka Central Police Station, for instance, about 75 police officers are expected to report for the day shift from 8 to 17 hours. More than half of them are detailed to guard vital installations, banks and VIPs. A large number of them have to attend to routine desk work at the station. It leaves virtually nobody for the beat system. As already mentioned in chapter 5, underfunding is one of the sources of police operational problems. In the 1986 Police Annual Report for instance, the Inspector-General of Police had this to say:

"It is not uncommon these days to see an officer on patrol dressed in torn uniform and in improper shoes like canvas or sandals. Officers on patrol in operational areas sleep in torn tents and are constantly soaked by rain. They cook their meals in oil drums which have been cut in half... This does not raise the morale of officers".¹³.

The police ability to perform crime prevention functions may be seen against the rate of recovery of stolen property. In 1988 for instance, property worth K202,956,607.17 was stolen nation-wide of which only K24,178,691.64 (or 12%) worth was recovered. During

the same year property worth K36,565,996.50 was stolen in Lusaka¹⁴ of which only K7,758,722.00 (or 21%) was recovered. The police have made efforts towards asserting their role in crime prevention. In 1974, a police-public relations unit was established at the Police Force Headquarters in Lusaka. The unit embarked on a campaign to improve the public image of the police through education. The target group in the first instance was to be schools and colleges. The aim of the campaign was to educate the public on the role of the police in society and the need for public cooperation. That exercise encountered several operational problems from its inception. Funding was not available for specialised personnel and facilities such as audio-visual equipment.

In 1977 the Research, Planning and Development unit was formed at the Police Force Headquarters in Lusaka. Its objectives are to collect, collate and analyse data pertaining to the operation of every section of the Police Force with a view to identifying the weaknesses, strengths, achievements, failures etc. To-date no significant success has been reported from this unit. Fourteen years after its formation this unit is still awaiting official recognition and approval from the Ministry of Home Affairs.

In 1978 the police acquired computer facilities, but up to now they have not yet developed an information system for criminal records. The only information systems developed so far are for motor-vehicle registration, international police functions and fire arms registration.

The consequence of police inability to take an active role in crime prevention is public loss of confidence in them. In a victimization survey already referred to (chapter 1) a suprisingly high number of victims of property crime amounting to 88% claimed to have reported offences to the police. A vast majority of them were, however, disappointed for it was only in 8% of the cases that arrests were made.

The present study has confirmed the low clear-up rate as Table 15 39 shows. It can be seen from this Table that house breaking and theft seemed the most difficult cases to detect. On the other hand, theft by servants and by public servants seemed the easiest to detect. As was mentioned in chapter 4, the suspect is usually known in these offences and in most cases the victim/ employer hands over the suspect to the police.

The majority of victims in the victimization survey who did not report offences (ie.88% of the 12%) gave as the reason that in their opinion the police would not have apprehended the offender. Most of those who did report expressed dissatisfaction with the police handling of complaints. It was for instance, common for the police to tell victims that they had no transport or fuel to visit the scene of the crime. Thus 79% of the victims felt that the police were not doing enough to prevent property crime. One of the victims said:

"...further, when one reports an offence to the police... one is sometimes told to go and commit the same offence to compensate. Surely this is a very demoralising response coming from people paid out of tax payer's money and who are supposed to be disciplined".16.

Another victim put it this way:

"When a crime is reported to the police, they say that they have no transport, so the victim will provide transport and go to fetch them. When they arrive at the scene, they just take down a statement and say that they will investigate and come back to you. It will be months before hearing from them and in most cases one does not hear from them at all."17.

It was therefore not at all suprising that 23% of the victims felt that the effect of property crime was that it made them lose confidence in the ability of the police to prevent crime.

Serious thought should be given to the possibility of establishing a crime prevention unit within the Police force. The unit should be charged with the responsibility to coordinate crime prevention activities. Membership of the unit should possibly be extended to non police officers such as lawyers, researchers (from the planned Institute of Criminology at the University of Zambia), development planners from the Ministry of Finance, civic leaders, businessmen, church leaders and representatives from voluntary organizations such as the Rotary Club. The crime prevention unit should also raise funds for its operations especially from business houses.

The police should try to show more civility in their handling of public complaints. The current practice at some stations whereby complainants are treated as the potential suspects and subjected to extensive questioning should be discouraged. They are sometimes accused of having been "careless" even before they explain the circumstances of the offence. Interestingly the same
18
practice is reported as common in Nigeria.

8:3 The Legislature.

Since independence, property offences have attracted the

attention of the legislature more than any other group of offences. Up until 1974, the general punishment for theft was a maximum of 3 years imprisonment. In that year, the maximum sentence was increased to 5 years imprisonment. Similarly, the maximum sentence for theft by public servants was increased from 7 to 15 years imprisonment. But the most significant sentencing changes have been in the case of robbery and aggravated robbery, theft of a motor-vehicle and stock theft. The latter three¹⁹ offences are a subject of minimum sentences.

8:3 (a) Robbery and Aggravated Robbery.

Prior to 1969, robbery was punishable by a maximum term of 14 years imprisonment and aggravated robbery was punishable by life imprisonment. Unfortunately, official statistics do not show separate figures for the two offences, but record both as either robbery or aggravated robbery.²⁰

Official records show that there was a steady increase in the rate of reported robbery between 1964-1969. The reported rate was 8.7 per 100,000 population in 1964, which rose to 14.0 per 100,000 population in 1966 and to 32.4 per 100,000 population in²¹ 1969. Much of the crime news in the newspapers between 1964 and 1969 was devoted to robbery. On Tuesday , 30th of January, 1968 for example, the Times of Zambia reported:

"Armed bandits, suspected to have entered Zambia from the Congo (now Zaire) have struck...At the week-end six armed men broke into Solanki's store im Main Street, Mufulira. They fired 2 shots at the night watchman and 2 shots at the police and escaped with goods worth K580 in a grey Land Rover without a number plate. Police believe the gang to be the same one which had earlier raided Kansengi Service Station in Ndola, tied up the attendant and stole tyres, tubes, crates of soft drinks and engine oil".²²

In 1969, the government responded to the rise in the reported robbery rate by enacting the Penal Code Amendment Act (No2). That amendment imposed a minimum sentence of 15 years imprisonment for aggravated robbery. Statistical evidence shows that the minimum sentence does not seem to have had the desired effect. Reported robbery dropped slightly to 32.2 per 100,000 population in 1970 but rose again to 36.1 per 100,000 population in 1972, followed²³ by a slight drop to 35.9 per 100,000 population in 1974.

Meanwhile, media reports on robbery continued. On 23rd December, 1973, the Times of Zambia reported: "A storeman was shot dead and a female customer injured by armed bandits when they raided Gubby Store yesterday in Ndola".

At a Constituency meeting in Kabwata, Lusaka, voters told their Member of Parliament that public hanging should be introduced for²⁴ people convicted of armed robbery. This was the first time that the question of the death penalty in relation to armed robbery was raised in public. The question was again discussed at the General Conference of the ruling Party in April 1974. At the end of the conference, one of the resolutions passed (Resolution 10a) called for the introduction of the death sentence for armed robbery.

On 24th July, 1974, the Minister of Home Affairs made a ministerial statement on the matter in Parliament. He said that since January (1974), 451 cases of aggravated robbery had been reported and "dealt with" by the police resulting in 177 convictions. Among those convicted were the 3 men responsible for

the death of a cashier in Kitwe in which K80,000. was stolen.

The Minister went on to say:

"I will like to assure the Hon. Members of the House that it will not be too long before we completely eliminate robbers, even if we might be forced to use crude and extremely ruthless methods in the interest of law abiding persons."26.

The Bill to provide for the death penalty for aggravated robbery was formally introduced in Parliament by the Minister of Legal Affairs. He told Parliament that it was being introduced in accordance with the resolution passed at the Party General Conference.

That Bill was well received in Parliament as it was generally believed that only the death penalty would reduce the incidence of aggravated robbery. But there is no statistical evidence generally, to show that the death penalty has had the desired effect either in the whole country or in Lusaka. There was, however, a reduction in reported cases nation-wide to 25.5 per 100,000 population in 1976, which was followed by an upward trend between 1978-1982 (Table 7). There was a general decline in reported robbery between 1984-1988, although 1986 recorded a considerably higher rate (Table 7). The Lusaka data seems to follow closely the nation-wide trend. As Table 5 shows, the robbery rate has dropped since 1984, although there was an increase in the reported rate in 1986.

It is difficult to determine whether the drop in the reported robbery rate during the periods mentioned above was due to the deterrent sentence. Many factors independent of the death penalty

such as under-reporting or recording patterns could account for the drop. Besides, it is difficult to determine what proportion of reported offences were robbery or aggravated robbery. From the results of this study, however, it may be possible to make a rough estimate. Forty-seven of the 1129 defendants whose records were studied (all available records in Lusaka between 1982-1989) were charged with robbery. In addition to the 1129 defendants, there were 59 other defendants charged with aggravated robbery who were not part of the defendant sample but whose records were nevertheless seen. The 59 defendants were not included in this particular sample because their case records were incomplete having appeared before magistrate's courts for preliminary hearing only. Magistrates have no jurisdiction over aggravated robbery. On the other hand, of the 14 offenders convicted of "robbery" who were in Lusaka Central Prison at the time of field work, 8 had been sentenced to death for aggravated robbery. At the time of the interviews, they were awaiting appeal hearings. The point being made here is that if aggravated robbery defendants seem to be over-represented in the official robbery figures as this study tends to show, it may be assumed that the death penalty has had no deterrent effect.

8:3 (b) Theft of a Motor-vehicle.

Until 1974, the offence of theft of a motor-vehicle was not specifically provided for in the Penal Code, but was considered as part of the general law of theft. Like any other theft it was (until 1974) punishable by a maximum sentence of 3 years imprisonment. Statistics show a general increase in the rate of

reported theft of a motor-vehicle between 1964-1973. The rate rose from 19.6 per 100,000 population in 1964 to 30.0 in 1976, then rose to 57.0 in 1970 and to 57.9 per 100,000 population in 1973.²⁷

In 1974, two significant changes took place. Firstly, a specific section was inserted in the Penal Code to provide for the offence of theft of a motor-vehicle.²⁸ Secondly, the punishment for the offence was enhanced. In the case of a first offence, a maximum sentence of 15 years was imposed. In the case of a second or subsequent offence a minimum sentence of 7 years up to a maximum of 15 years was imposed.²⁹

Statistical evidence shows that, generally, both in Lusaka and nation-wide, the rate of reported theft of a motor-vehicle has been declining since 1973. Nation-wide, the rate dropped to 46.3 per 100,000 population in 1975, but rose slightly to 46.5 per 100,000 population in 1977.³⁰ Table 7 shows that, nation-wide, the rate of reported theft of a motor-vehicle declined between 1978-1988, except for the years 1982 and 1986. Similarly, Table 5 shows that the reported rate in Lusaka declined generally between 1978-1990, except for 1982 and 1988. It is not clear to what extent the drop can be attributed to the deterrent sentence. What is clear, however, is that the vast majority of motor-vehicle thefts are reported for insurance claims. Hatchard has pointed out that the steady decline in reported cases may be attributed to "effective police work in crime control and prevention."³¹ It may also be mentioned that tight border controls especially since 1986 could be the alternative explanation. It

was seen in chapter 3 that this study confirmed police evidence that there is a high proportion of foreign nationals involved in the theft of motor-vehicles which are driven across the border into Zaire. Since 1986 stricter control of traffic flow between
32
Zambia and Zaire has been imposed.

Despite that continued decline in reported cases, Parliament amended the law in 1987 and imposed a minimum sentence on first offenders as well. A first offender now faces a minimum sentence of 5 years and a recidivist faces a minimum of 7 years imprisonment. In both cases the maximum sentence is 15
33
years imprisonment. This increase in the penalty for the offence might have been prompted by the high cost of motor-vehicles due to inflation which, as seen in chapter 1, runs at 135%. It was seen in chapter 6 that after 1974, when the maximum sentence for first offenders was raised from 5 to 15 years imprisonment, it was common for magistrates to impose a sentence of 5 years on first offenders. The Appeal Courts (the High Court and the Supreme Court) did not consider that sentence excessive and therefore did not interfere with it. The amendment might have been intended to give judicial practice a legislative backing.

8:3 (c) Stock Theft.

In some parts of the country, notably the Southern, Western, Central Provinces possession of cattle has always been considered a symbol of wealth and status. Theft of those animals has always been considered as a serious offence. Thus the first Penal Code (enacted in 1933) provided for a maximum sentence of 10 years
34
imprisonment for stock theft. This was a very severe sentence

considering that the maximum sentence for general theft at that time was 3 years imprisonment.

Available evidence shows a general nation-wide increase in the rate of reported stock theft between 1964-1970. The rate increased from 9.4 per 100,000 population in 1964 to 16.6 in 1966, to 19.9 in 1986 and to 23.8 per 100,000 population in 1970.³⁵ In 1970, the Penal Code was amended to provide for a minimum sentence of 7 years imprisonment for stock theft and 10 strokes of a cane. This increase in the severity of sentences was clearly intended to be a deterrent.³⁶

That legislation was followed by a sharp drop in reported cases to 17.2 per 100,000 population in 1972. That drop, however, was only temporary as there was an increase in the reported cases to 21.2 per 100,000 population in 1974.³⁷

During the Parliamentary debate on the above amendment, several Members expressed displeasure at the new sentence. One M.P. pointed out that it was ridiculous that the law should provide a minimum sentence of 7 years imprisonment for theft of a goat and yet the normal sentence for manslaughter was no more than 3 years imprisonment (the maximum sentence for manslaughter is life imprisonment).³⁸

The government defended the amendment in two ways. Firstly, it was argued on the basis of deterrence, that manslaughter was an offence committed unintentionally or under provocative conditions. On the other hand, stock theft was a deliberate act. The Minister of Legal Affairs put the matter this way:

"...for someone to go into the bush and look for stock, catch it, slaughter it and put it on a lorry (to the market) was a completely different thing done by an individual and such a person should be given the necessary punishment so that the animals could multiply in his absence." 39. (brackets are the writer's).

Secondly, it was argued on economic grounds that stock was a very valuable commodity and a potential foreign exchange earner which
40
should be protected.

The government's position remained unconvincing. So in 1974, the Penal Code was again amended in relation to this offence in two fundamental ways. Firstly, the amendment removed the additional mandatory caning order. Secondly, it restricted the minimum sentence of 7 years imprisonment to a second or subsequent offence. In the case of a first offence the new law imposed a maximum sentence of 15 years imprisonment which also applied to
41
the second or subsequent offence.

The new legislation was followed by a slight drop in reported cases to 20.2 per 100,000 population in 1976. Table 7 shows that the reported rate for stock theft, nation-wide, increased steadily between 1980-1986. As for Lusaka, Table 5 shows that the rate increased slightly between 1978-1980, followed by a sharp drop between 1984 and 1986. The reported rate for this offence increased between 1988-1990.

In 1987, the law was again amended in a significant way. This amendment established a separate sentence for theft of "a bull, cow and ox". In the case of a first offender, the new law imposes a minimum sentence of 5 years and in the case of a recidivist it imposes a minimum sentence of 7 years imprisonment. In both

cases the maximum sentence is 15 years imprisonment.

The new Act is silent on the punishment for theft of other animals. In addition, it is not clear whether theft of any other animal, say, a goat is still stock theft. It probably means that there are now two categories of stock theft. If that is really the case, the implication is that punishment for theft of any animal other than a bull, cow or ox is still governed by the 1974 amendment. Whatever the case is, the Penal Code Amendment (No.2) Act No. 1 of 1987 has brought uncertainty to the law of stock theft which now needs urgent clarification.

The Act in question became operational in 1988. That year saw a reduction in reported stock theft cases nation-wide (Table 7). On the other hand reported cases went up in Lusaka as Table 5 shows. It, however, remains to be seen whether the reduction in reported cases nation-wide will be sustained.

8:4 The Courts: Sentence Length for Property Offenders and Other Offenders Compared.

From Table 40, it is clear that the largest proportion of offenders imprisoned between 1980-1986 (by all courts nation-wide) were serving a sentence of between 6-12 months (inclusive). In contrast with their Kenyan counterparts, ⁴³ ~~Zambian~~ courts seem to impose much longer sentences.

There are, however, two shortcomings associated with this Table, which is extracted from official records. The first shortcoming is that it covers all offenders imprisoned for all offences under

the Penal Code. Official figures showing sentence length are not broken down into offence categories. The second shortcoming is that the Table does not break the "eighteen months and over" sentence down into further categories. Again official records do not break that sentence length category down any further.

Tables 34 and 41 which are based on the results of this study (case records and interviews respectively) attempt to fill the two gaps in the official data. In the case of Table 34 the "eighteen months and over" sentence has been broken down into individual sentence lengths. In the case of Table 40, that sentence length category has been broken down further in accordance with the official 6 month interval between sentence length categories.

From Table 34, it is clear that the majority of imprisoned offenders in this study i.e 51% were sentenced to between 6-16 months imprisonment, 44.2% were sentenced to between 18-84 months imprisonment and 4.8% were sentenced to less than 6 months imprisonment. As for the interviewed offenders, 63.5% were imprisoned for more than 18 months and over, 34.1% were imprisoned for 6-12 months and 2.4% were imprisoned for less than 6 months. On the other hand, Table 40 (official records) shows that on average, 25% of all prisoners between 1980-1986 were sentenced to 18 months and over. The three Tables (i.e Tables 34, 40 and 41) seem to suggest that property offenders might have been over-represented in the "eighteen months and above" sentence category. An examination of Tables 42 and 43 seems to confirm the view that property offenders nation-wide and in Lusaka were

sentenced to longer terms than the rest of offenders between 1984-1988.

At a glance, it appears from Tables 42 and 43 that offenders in Divisions II, IV and VII (i.e offences against lawful authority, offences related to property and forgery, coining and impersonation respectively) were singled out for custodial sentences. It must, however, be pointed out that other than offences related to property, the other two Divisions are somewhat special cases.

In the case of Division II offences, the offence of "escape from lawful authority" had the largest proportion of offenders sentenced to imprisonment during most of the period shown in Tables 41 and 42. In 1988 for example, 82.7% of the imprisoned offenders nation-wide and 88.9% in Lusaka in that Division were convicted of the offence in question. Escape from lawful custody is regarded as "aggravated law breaking" as it seriously undermines law enforcement, and for this reason imprisonment seems to be the appropriate punishment. It seems therefore that the large number of offenders convicted of escape from lawful custody inflates the imprisonment figure for Division II offences. In other words, the high rate of imprisonment for Division II offences does not reflect a general tendency on the part of the magistrates to imprison offenders convicted of those offences. Rather it reflects the nature of offences in that Division.

On the other hand, uttering and currency offences account for the high imprisonment figure for Division VII offences. Virtually all

those convicted of those offences are sent to prison. In 1988 for example, all the 12 offenders convicted of offences in that Division in Lusaka were sent to prison (see Table 43). It may be concluded that property offenders both nation-wide and in Lusaka were, between 1984-1988, singled out for the application of custodial sentences. They were also singled out for longer prison sentences.

But despite the long sentences handed out to property offenders, the effectiveness of this measure as a public protection strategy is doubtful. In other words, imprisonment protects the public from a very small proportion of offenders. It has already been seen that a victimization survey conducted in in Lusaka and other major towns showed that 88% of the victims reported the offences to the police. On the other hand, data from Lusaka shows that only 28% of the reported cases are cleared up. This means that only 24.6% of the offences in Lusaka are cleared up (ie 28% of 88%). Of the 24.6% cases, nearly half of them are withdrawn as chapter 5 shows. A certain proportion of the remaining cases are dismissed or the offenders involved are acquitted while others are not taken to court for various reasons. Finally it is in less than 12% of the reported cases that the offenders end up being convicted, of whom about 7% are imprisoned.

8:5 The Prisons.

8:5 (a) The Purpose of Imprisonment: Official View.

The purpose of imprisonment may be spelt out in terms of sentencing aims of deterrence, rehabilitation or incapacitation, as expressed in official documents or policy statements. In

Zambia, this matter is difficult to determine because there is no clear policy on imprisonment or on sentencing in general. However, some form of policy guide-lines may be found in presidential speeches and writings, during the period 1964-1991. The President has, for example, said that: "Zambia has rejected retribution and deterrence policies in favour of rehabilitation of offenders"⁴⁶. Rehabilitation is a "scientific control of behaviour". This is done on the assumption that criminal behaviour has certain symptoms which, when discovered can be treated therapeutically.⁴⁷

Rehabilitation in this classical sense failed to appeal to many people. It became clear that the rehabilitation approach was too narrow as it did not take into account the social circumstances of the offender's environment. In the United States, for example, ethical questions about rehabilitation began to be raised when release from prison depended on how fast one was rehabilitated. It meant that prisoners with less ability to learn were kept longer in prison.⁴⁸ Rehabilitation has largely been abandoned as a principle behind imprisonment in as far as it seeks to modify behaviour.⁴⁹

In the Zambian context, rehabilitation entails education of the prisoners, particularly in vocational skills such as carpentry, brick-laying , tailoring and agriculture. Under those programmes, prisoners are taught new skills or helped to improve the existing skills. Religious and academic education is also available but emphasis is put on vocational training.

Upon their release, ex-prisoners are expected to utilise the skills they acquired in prison on wage or self-employment. The implication is that crime results from lack of employment. This⁵⁰ study, however, does not seem to bear that out in many cases.

Recidivism, still remains the main indicator of the success or failure of any crime control strategy or series of strategies,⁵¹ although its value for this purpose has been questioned. Unfortunately, official Zambian data does not break recidivism rates down into different offence categories. Between 1980-1986, an average of 57.9% of prisoners, for all offences nation-wide, were first offenders, as Table 15 shows. The rest of the⁵² offenders, representing 42.1%, were recidivists.

The vast majority of prisoners are convicted of property offences as indicated in chapter 3. In Lusaka Central Prison, for example, 77% of the prison population at the time of this study were property offenders. An earlier study in which the records of 100 recidivists with three or more previous convictions were studied,⁵³ found that 84% of them were convicted of property offences. It may safely be assumed therefore that a majority of recidivists are convicted of property offences.

The high rate of recidivism may suggest that rehabilitation as a method of crime prevention has not been successful. It appears that many prisoners leave prison not as reformed men but embittered and confirmed in criminality. There are a number of reasons why it has apparently failed. The sentencing regime allows little room for a rehabilitative sentence. Magistrates do

not believe in prison rehabilitation and prison facilities and conditions are inadequate. We need to elaborate on this.

Individualised sentencing is at the core of a rehabilitation⁵⁴ policy. That type of sentencing needs a sentencing regime which has adequate facilities for a careful assessment of the needs of each offender. At the moment that is lacking. Social enquiry reports do not exist except in the case of juvenile offenders, but even in the case of juveniles, such reports are not always available. As seen in chapter 6, magistrates do not have detailed information about the circumstances of the offender at the sentencing stage. They therefore lack the necessary factual basis upon which an individualised or rehabilitative sentence can⁵⁵ be based.

It is not therefore surprising that magistrates in Lusaka have little faith in prison rehabilitation. All the 9 magistrates who formed the judicial sample in this study felt that there was no possibility for rehabilitation of offenders in Zambian prisons. As Table 44 shows "reformation" as a reason for sentence was mentioned in only one case, representing 0.8% of the cases in which a reason for sentence was given.

The magistrates cited over-crowding, lack of both equipment and personnel as the principal reasons why prison rehabilitation was impossible. An examination of the existing facilities for the rehabilitation programme in Lusaka Central Prison and discussions with prison officers involved in the programme confirmed the views of the magistrates.

Luaska Central Prison functions in part as a "receiving bay". Periodically, transfer of prisoners to other prisons in the country, particularly open air prisons, takes place. Transfers are sometimes disruptive of rehabilitation programme as they do not take into account the individual offender's rehabilitation programme if any. Continuity becomes difficult and as a result, literacy classes, for example, have had to be abandoned altogether.

In between transfers, i.e 4-5 month periods, over-crowding becomes acute. Nearly all the offenders interviewed in this study claimed that their cells were so congested that they hardly had any room to stretch out their legs at night and spent the whole night squatting.⁵⁶ Prison cells were originally built to accommodate 30-35 inmates, but in between transfers, they accommodate between 80-100 inmates.

Magistrates are aware of the problem of over-crowding. They, however, feel that it is for the prison authorities to address the problem as already seen (chapter 4). Consequently, 6 out of the 9 magistrates said that they did not take into account the availability of space in prison when imposing a prison sentence.

It seems that there is also a lack of commitment to the rehabilitation programme on the part of the prison authorities themselves. An earlier study reported that:

"...industry and education only take a small number of prisoners, the majority of the prison population are given non-rehabilitative jobs such as kitchen duties, cleaning police stations, courts and government offices..."⁵⁷.

In the allocation of inmates to rehabilitative programmes such as carpentry and tailoring, inmates who already possess those skills are preferred to those who do not. This is an economic decision which aims to maintain the quality of prison products thereby maintaining the competitiveness of the prison industry. Similarly, in academic education, prisoners with some basic education are preferred to those without. On the part of the offenders themselves, there was little appreciation of the value of rehabilitation. Less than 10% of those interviewed thought that they were learning a skill or improving on their skills in a way that would be useful in their re-settlement outside.⁵⁸

Lastly, it may be mentioned that there are few opportunities for "rehabilitated" offenders once out of prison. Many of them cannot sell their prison acquired skills given the competitive job market and high unemployment in Lusaka. Most prospective employers are less keen on employing ex-prisoners. Besides, the largest employer in the country, the civil service, cannot as a matter of policy employ people with a criminal record. Failure to disclose a criminal record on the employment application form, regardless of when the conviction occurred, is contrary to Civil Service Standing Orders and can result in the instant dismissal of the employee. In other countries, measures have been taken to ensure that for certain categories of convicted offenders who have not been re-convicted within a specified period of time, their convictions are considered "spent". The general effect of having a conviction "spent" is that no reference can be made to it and no one should publish it.⁵⁹

8:5 (b) The Purpose of Imprisonment: Judicial View and Practice.

The judicial view of what imprisonment should achieve in crime prevention, may be seen in what is termed as "the principle behind imprisonment". That principle means: "...the sentencer's opportunity to express to the offender or to the public or to ⁶⁰ counsel what they hope will be achieved by the disposal". But in the Zambian context, the principle behind imprisonment is difficult to gauge because, as seen in chapter 6, sentencers are not expected to give reasons for the sentences they impose. It was not therefore surprising that in this study, magistrates did not spell out their reasons in as many as 77.3% of the cases. (see Table 44). Reasons for sentence were spelt out in relation to only 123 (23%) of the 538 offenders and in relation to 103 (29%) of the 354 imprisoned offenders.

Deterrence was cited as the reason for sentence in 58 out of the 123 cases or 47.2% of the cases in which the reason for sentence was stated. Deterrence, as Table 44 shows, was significantly related to imprisonment. Thus it was hardly suprising that in 56 out of the 58 cases or in 96.5% of the cases in which deterrence was cited, offenders were sentenced to imprisonment. Magistrates seemed to regard imprisonment as the most deterrent form of punishment, at least in as far as property crime was concerned. In contrast with the official view as seen in the previous section, magistrates seemed to regard deterrence as the aim of imprisonment.

The prevalence and the seriousness of the offence were cited in 57 out of the 123 cases (46.3%). In 39 out of the 57 cases

(68.4%) in which prevalence and seriousness of the offence were cited, imprisonment was the sentence imposed. In 10 out of the 57 cases (17.5%) caning was the order made. It was seen in chapter 6 that the caning order could be justified as a means of dealing with an exceptional outbreak of crime.

On the whole, it would appear that magistrates felt that some form of justification was particularly needed in relation to three types of sentences. These sentences were imprisonment, caning and suspended sentences. The reason for this may be that the three are among the most serious sentences and for that reason they need to be justified.

Deterrence has been defined by Professor Walker as: "what happens when one or more persons refrain from activity on one or more occasions because they fear the consequences". According to Professor Walker, it is essential to include "on one or more occasions" because some people may be deterred on some occasion,⁶¹ but not on others.

A deterrent sentence is supposed to achieve three aims. Firstly, it ensures that while in prison the offender is incapacitated from committing further offences against the public. This aim does not, of course, ensure that the offender does not commit offences against fellow inmates or indeed against prison officers. Secondly, the prison experience should discourage the offender from re-offending in future once released. This aim is variously referred to as the "rehabilitation effect",⁶² "individual deterrence", "primary" or "specific deterrence".

Thirdly and lastly, deterrence serves as a warning to potential offenders of what awaits them should they engage in criminal activities. This aim is referred to as "general deterrence".⁶³

As we have seen in the previous section, the present sentencing regime does not favour the rehabilitation of offenders. Rather, it seems to favour deterrence. The existence of minimum sentences (as well as caning) emphasises and reinforces the deterrence philosophy of punishment. These sentences have curtailed discretion which is crucial in arriving at a sentence relevant to the rehabilitative needs of an individual offender.⁶⁴

The relationship between deterrent punishment and the rate of offending or the rate of recidivism is not clear. But interestingly, offences to which the deterrent sentences apply, particularly robbery and stock theft, recorded a sudden drop in reported cases soon after every announcement of deterrent legislation. That drop, however, was not to be sustained for long as the reported rates increased soon after. Deterrent measures therefore, seemed to have had a sudden but unsustainable positive effect on offending rates. On the other hand, there is no way of proving that the sudden drop in reported offence rates could be solely attributed to deterrent measures. As Professor Walker has pointed out: "If people did not refrain out of fear of consequences, they were not by definition deterred".⁶⁵

When the rate of recidivism is examined, it becomes clear that deterrence has had no significant effect. As Table 15 shows, 42.1% of the offenders nation-wide between 1980-1986 were

recidivists. It has also been seen in the previous section that most recidivists are property offenders.

There are at least three main reasons why deterrent measures seem to have failed. Firstly, there has been a somewhat naive optimism about the feasibility of deterrence. It is not possible to deter all offenders. Deterrence research elsewhere has revealed that deterrence is effective in some crimes but not in others. For instance, Lewis has reported that:

"The deterrent effect is stronger for rape and assault, weakest for hijacking and fraud, with robbery, burglary and auto theft, larceny and murder in between...for most crimes, a substantial majority of studies have found a negative association between crime rates and sentence severity".⁶⁶.

Secondly, deterrent legislation and its implementation by the courts has not been accompanied by other supportive measures from another organ in the criminal justice sector, namely the police. For deterrence to achieve its intended results, the Police Force must be effective to ensure a high degree of certainty of arrest and conviction. As seen in Table 39, the clear-up rate is quite low. In chapter 5 we saw that 63% of the withdrawn cases were withdrawn at the instance of the police prosecutors. Many of those cases were withdrawn because the police failed to serve summonses on witnesses, who in turn failed to come to court and give evidence. Other cases were withdrawn because the police repeatedly failed to bring the defendant to court from the remand prison. The chances of the defendant escaping detection and conviction are quite high. This obviously weakens deterrence.

Thirdly, the system has not dealt firmly with receivers of stolen property. At the moment, receivers of stolen property are not

prosecuted but are only summoned to court as prosecution witnesses (chapter 4). The availability of a market is an incentive to property crime. Deterrent efforts may be more effective if they include measures to destroy that market.

8:6 The Public.

8:6 (a) The Neighbourhood Watch Scheme.

A neighbourhood watch scheme has been defined as "...a social defence organization of people brought together by their common fear of victimization"⁶⁷. Like similar schemes elsewhere, the neighbourhood watch scheme in Lusaka is a voluntary organization to prevent property crime, especially burglary.

At the moment there is no law or regulation under which this scheme can operate. The police advice to neighbourhoods intending to establish the scheme is that they do so under the law regulating the vigilante scheme. The two schemes are, however, quite different as it will be shown later in this chapter.

Unlike the vigilante scheme (to be discussed later) which is supposed to exist at every branch, section and ward of the Party, the neighbourhood scheme exists in three residential areas only, i.e Kabulonga, Roma and Avondale. These are among the most affluent areas in Lusaka and in which the general view is that property crime is committed there by people from the poor communities.⁶⁸ In all the three areas, the scheme has been in operation for at least six years.

Residents have come together in those areas first of all to elect

individuals amongst them who have the responsibility of the day to day running of the affairs of the scheme. They then donate money regularly towards the running of the scheme. In Roma for instance, the neighbourhood scheme has bought a Land Rover from donations which is being used for patrols in the area.

Residents then take turns to patrol their neighbourhood between 8 PM and 6AM. Those who are unable to do their rounds provide fuel or surrender their personal vehicles for patrols instead. The patrol team is accompanied by two uniformed and armed police officers. The police officers are also equipped with a two way radio, to establish a communication link with the Lusaka Central Police Station. Where necessary, the patrol team summons help from the regular police through the central station. The response time is said to be about 10 minutes.

The police officers interviewed in this study spoke highly of the neighbourhood watch scheme. It is disciplined and has the support of many residents. It was also reported that burglaries⁶⁹ had declined sharply in the areas where the scheme was operating. Statistical data seemed to confirm that view. Figures for reported burglary covering a period of six months from January-July 1989 were obtained from Woodlands Police Station where Kabulonga neighbourhood watch scheme falls. These figures were then compared with those obtained, over the same period, from the Lusaka Central Police Station, where Olympia Park, a neighbourhood similar to Kabulonga, but which has no such scheme falls. It was found that during that period Lusaka Central Police recorded around 1.5 times more burglaries than did Woodlands

Police. An examination of reported burglary figures at Woodlands Police Station before and after the introduction of the neighbourhood scheme in near-by Kabulonga showed a steady decline of reports after the scheme was introduced, i.e, in the last six years. Reduction in reported burglary should, however, be seen in the light of other factors. Precautionary measures by the potential victims and population movement affecting the potential offenders and victims are factors that affect crime rate.

Table 5 shows that there has not been a constant decline in the overall burglary reports in Lusaka during the last six years. This picture may not really represent an overall failure of the neighbourhood watch scheme. It is probably a result of ⁷⁰ "displacement effect", in which burglars have turned their attention to unpatrolled areas, thus creating the impression that burglaries have not declined in the three residential areas discussed above. But the displacement effect itself, in as far as it changes crime pattern may be an indication of the success of the neighbourhood watch scheme.

It should also be understood that a neighbourhood watch scheme ⁷¹ cannot completely protect neighbourhoods from crime. It only reduces the chances of victimization. Available evidence, though insufficient, tends to show that the scheme can succeed. But its true effectiveness will only be fully assessed after it has been widely implemented and over a long period of time. It is also important that the existence of the scheme is publicised as much as possible.

8:6 (b) The Vigilante Scheme.

The initial moves to form the vigilante scheme were made at the 17th National Council meeting of the ruling party held in 1982. At that meeting a directive was issued to the party to mobilise all its members in Wards, Branches, Sections and in places of work to form security committees. These committees were to ensure that crime of every description was prevented or detected soon after it was committed. Three years later (i.e, in 1985) the 20th National Council meeting reiterated the directive issued at its 17th meeting and urged a speedy implementation of the vigilante
72 scheme. During the same year, the vigilante scheme came into being as a result of the enactment of the Zambia Police Amendment Act, Number 23 of 1985. This Act repealed a section in the Zambia Police act which established special constables. Special constables were appointed by police officers-in-charge and came under the professional control of the police. They also enjoyed the same powers and privileges as police officers.

The 1985 Act has since replaced the special constables with "vigilantes". The vigilantes are recruited and supervised by the ruling Party. They are subjected to the political control of the Party leaders at the section, branch and ward levels of the Party. Under the Act a person cannot be appointed a vigilante unless he:

- (a) volunteers to serve as a vigilante,
- (b) is resident in that section (of the Party),
- (c) is at least eighteen years old,
- (d) is of good moral character,
- (e) is physically fit and
- (f) has no previous convictions. 73.

The vigilantes enjoy powers of arrest. They have the power to arrest any person who in their presence commits a cognizable offence or whom they reasonably suspect of having committed a felony. A vigilante is expected to hand over the arrested person to a police officer without delay or, in the absence of a police officer, to take him to the nearest Police Station.

The vigilante scheme was intended to assist the police in crime prevention and to narrow the growing gulf between the police and the public. Evidence, however, tends to show that none of these aims has been achieved. The fact that the scheme is subjected to political control has been a controversial issue. In areas where party organization is weak or where party functional structures do not exist, efforts to establish the scheme have been frustrated. The vigilantes themselves claim that they are a direct creation of a powerful political party and are only answerable to it and not to the police. They resent what they term "police interference" in their work and choose to pursue their own brand of crime prevention: "instant punishment". Further, they regard themselves as "indigenous" because they are "home-grown" and see the police as a creation of a former colonial power and therefore "illegitimate". On the other hand, the police claim that the vigilante scheme has seriously undermined law enforcement. One senior police officer put it this way:

"In some cases, some Party officials get involved in criminal activities and the vigilantes do not have the courage to report them, let alone arrest them. In other cases, the vigilantes themselves commit crime and where

that is the case, there is suppression of valuable information and evidence".76.

Even though the control of vigilantes is entrusted to politicians at grass-root level, individual vigilantes have to depend on the police for equipment such as batons, whistles and handcuffs. But no provision is made in the police budget for these additional expenses, neither is there provision for re-imbusement of vigilantes for their out of pocket expenses in the course of duty, such as transport. Another serious problem in the operation of the scheme is the absence of any form of compensation for vigilantes who may die or get injured in the course of duty, despite a recommendation to rectify this problem made at a 1989 party National Council meeting. Further, the envisaged cooperation between the police and the vigilantes has not been realised. A study of the implementation of the vigilante scheme by the ruling party's Control Commission reported:

"It has been observed in every area visited that coordination between the police and party leadership implementing and administering the vigilante scheme was not good at all. The poor working relationship between the police and the already appointed vigilantes discourages the would be applicants from joining the scheme and contributes to the ineffectiveness of the vigilante scheme".77.

The majority of the vigilantes are young and unemployed school drop-outs. They do not undergo any form of training. All that is required of them is that they are qualified under the criteria already referred to. They are then issued with batons, handcuffs whistles and uniforms-khaki trousers and shirts and red berets, where available. The lack of training affects the vigilantes in many ways. In all the cases in which the offenders were arrested by vigilantes in this study (i.e, in 7% of the cases as mentioned

in chapter 4 Table 17), they alleged that they were not immediately handed over to police officers or to the nearest police station as the law required. Instead the vigilantes took them to their offices in a market for interrogation. The suspects underwent beatings and verbal abuse before they were finally handed over to the police.⁷⁸

Lack of training also makes it difficult for the vigilantes to appreciate the distinction between crimes and civil wrongs. At one police station in Lusaka, a senior officer informed the writer that:

"A vigilante brought to the Police Station a man whose 'crime' was failure to pay rent. When we released the man the vigilante accused us of letting the 'criminal' off".⁷⁹

The year 1985, when the vigilante scheme became operational saw a greater amount of reported property crime in Lusaka than any other year between 1984-1988 (except 1987) as Tables 5 shows. But this does not really indicate a measure of success on the part of the vigilantes because there has been no sustainable increase in the over-all figures for reported crime nor for the number of persons arrested after 1985 (Table 5). Further, an examination of police statistics for Lusaka shows that 1985 recorded a comparatively higher number of false reports which did not result in the arrest of suspects. Whilst 11% of the reports received by the police in 1984 were recorded as "false", the proportion of such reports was 19% in 1985, 6% in 1986, 7% in 1987 and 9% in 1988.⁸⁰

The lack of a sustainable increase in the reported crime and the

sharp drop in false reports after 1985 are related. They both tend to show a growing strain in the relationship between the vigilantes and the police and the mutual lack of confidence. After 1985, the vigilantes seemed to have stopped referring cases to the police and began to deal with suspects in their own way, usually by threats and assault, of course without the backing of⁸¹ the law.

On the whole, the vigilante scheme seems to have been an ill-conceived idea. Little thought seemed to have been given to its relationship with the police on the one hand and its impact on civil liberties on the other. These are serious matters which should have been addressed within the context of "party supremacy" in a one party state. Hence, instead of being an organ to help the police fight crime, the vigilante scheme has become an "instant justice" mob under the cover of law.

The name "vigilante" itself is unfortunate. It has connotations of lawlessness and vengeance. Interestingly, the vigilante scheme⁸² is only active in high density and squatter areas of Lusaka. Their presence is also visible on the streets in the city centre. There is an absence of the neighbourhood watch scheme in those areas where the vigilantes are active much to the displeasure of the police. The reason is that the Party which raises and supervises vigilantes is more active in the poorer sections of Lusaka. These are also the areas with deep distrust of the police. Efforts should be made on the part of the suggested crime prevention unit to reach those areas and encourage the establishment of neighbourhood watch schemes which eventually

would replace vigilantes. The crime prevention unit can reach those areas through respected local figures and opinion moulders such as priests, teachers, and businessmen. Once that has been done, the existence of the vigilante scheme should be re-examined. In any case, the return of the country to multi-party politics last October has put the vigilante scheme in disarray and has made the case for the expansion of the neighbourhood watch scheme stronger.

8:6 (c) Instant Justice Mobs.

A daily feature of life in Lusaka today is the "instant justice" phenomenon, which has been defined as "A mob beating a suspected offender whose wrongful conduct has sparked off crowd hostility".⁸³ The area in Lusaka strongly associated with instant justice mobs is the city centre comprising the central market,⁸⁴ Cha cha cha Road, the main bus station and the super markets.

This study, however, found that the problem is not confined to the city centre alone. It also found that it is such a serious problem that it has in the past resulted in loss of life. At Matero Police Station, for instance, the writer heard evidence of its extent and seriousness:

"On a day in July (1989) at about 2 AM, two men went to a house in Chunga (a squatter area some 20 km. away from the city centre) which was under construction. They removed two door frames. The owner, who was there guarding his property heard them and alerted neighbours. A mob gathered and gave chase. One of the two men was caught and beaten to death".⁸⁵

According to Hatchard, the roots of instant justice are in the social structure of Zambian society. He puts it this way:

"Wealthy members of society take their own defensive

measures in the form of guards, dogs and building high walls around their business and residential premises...for poorer members of the society, living in high density areas in particular, such protection is far beyond their means...and with the apparent failure of any official response, many feel that it is necessary to take other measures to protect themselves and their families against criminals".⁸⁶.

Earlier, Chilala had found that the well to-do members of society particularly lawyers and senior civil servants condemned the practice, but found some considerable support for instant justice⁸⁷ among people in the low social economic group. Other people may be prepared to take part in instant justice mobs in future, after having had their property stolen as the victimization⁸⁸ study referred to earlier found.

The relationship between feelings of insecurity and low social economic status of the individual on the one hand and the participation in instant justice mobs on the other has been reported elsewhere. In Uganda for instance, Ssekandi has reported:

"When villagers realise that neither the courts nor the security officers are capable of protecting them, they resort to the killing of the robber...".⁸⁹.

The other explanation for instant justice mobs lies in the people's reservations about some aspects of the inherited criminal justice system. It is common knowledge that it is rare that suspects are caught by the police as Table 39 shows. Even for the few who are caught, the chances of their being punished are slight. As seen in chapter 5, 40.5% of the defendants in this study had the cases against them withdrawn, the majority of them by the police, 10.4% were acquitted, and 1.5% had their cases dismissed. Only 47.6% of the defendants were convicted. The

same chapter also shows that many people are impatient with the slow (but impartial) process of the trial and with what they see⁹⁰ as technicalities and necessary safe guards for the defendant. They therefore feel that it is justifiable to deal with the suspect immediately he is caught.

In this study, instant justice is defined as:

An after the fact social defence mechanism resorted to by people who feel that official action to deal with the suspect is not immediate or will not be available altogether.

The police ability to prevent crime is in decline. On the other hand, the gulf between the rich and the poor continues to grow. There is therefore little hope that a reversal in these trends which would stamp out instant justice mobs will occur in the near future. What is needed is a broadly based crime prevention policy which would effectively remove the need for this phenomenon. That policy requires the strengthening of the police ability to prevent crime on the one hand and the creation of neighbourhood watch schemes on the other. Other efforts, as seen in chapter 4, must be directed at building strong police-public relations.

8:7 A New Approach to Crime Prevention: Factors to be Considered.

We have seen that both rehabilitation and deterrence policies have failed as crime prevention strategies. On the other hand, "instant justice" mobs and vigilantes are the result of police failures to tackle the problem and the lack of public confidence in the police. It is suggested that policy makers⁹¹ should re-think the current crime control strategy.

The United Nations' Crime Prevention and the Treatment of Offenders Branch has formulated a set of guide-lines on crime prevention. These guide-lines are not based on deterrence. Rather, they lay emphasis on a broadly based approach, in the light of the particular circumstances of each individual country. Thus the Caracas Declaration, adopted by the Sixth Congress on Crime Prevention and the Treatment of Offenders and later indorsed by the General Assembly of the United Nations in its resolution 37/171 of 15th December, 1980 states:

"Crime prevention and criminal justice should be considered in the context of economic development, political systems, social and cultural values and social change as well as in the context of the new international economic order".

This means that the social factors, mostly associated with criminal behaviour in each country must not be lost sight of in planning for crime prevention. Crime control strategy in Zambia should therefore, partly address those social factors within the frame work of the Caracas Declaration which has not been adopted yet. Zambia's social, political and economic development is characterised by two broad factors, which should be incorporated into a new broadly based property crime prevention strategy. These factors are urbanisation and the characteristics of the urban population, on the one hand and the background characteristics of offenders on the other.

8:7 (a) Urbanization and the Characteristics of the Urban Population.

Urbanization in Zambia is a recent phenomenon. The country had
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no known indigenous pre-colonial urban settlements. Urbanization began at the turn of the century and it was accelerated by the

development of the mining industry which began in the early 1920s. The rate of urbanization has been so rapid that by 1963, 20% of the country's population was already living in towns. By 1980 the proportion of the urban population had risen to 43% of the national population, thus making Zambia one of the most urbanised countries in Africa.⁹³

Lusaka itself has had a tremendous population growth. In 1971 its population was 320,000 which more than trebbled in 20 years' time to 972,101 in 1990. Today, Lusaka has about 13% of the country's population. As seen in chapter 1, more than half of Lusaka's population, i.e 51.3%, is below 15 years of age, 33.7% is between 16-34 years and only 15% is 35 years and over. It means that 85% of the Lusaka population is aged 34 years and below.

It has already been mentioned in chapter 1 that a significant part of Lusaka's population has always migrated there from other parts of the country.⁹⁴ As seen in chapter 3, this study found that 72% of the interviewed offenders were born outside Lusaka. Of the 72%, 64% came to Lusaka to look for educational and employment opportunities, having been sent for by a brother, uncle or brother-in-law from another part of the country.

It may be mentioned that urbanization per se is notcriminogenic. In the Zambian context, however, certain aspects of it may be. The rate of urbanization in Zambia , as already mentioned, has been too rapid. It has not been accompanied by the creation of opportunities especially in education and employment as will shortly be demonstrated. Rather it has brought about poverty

and deep inequalities. As seen in chapter 1, by 1976, the poorest 40% of the population nation-wide shared 8% of the nation's income, while the richest 5% shared 35%. By 1985, it was reported that 10% of the country's population controlled 80% of the nation's income.

It has been pointed out that people in the rural areas of the country are in a better position than most of those in the urban areas. Most rural dwellers are able to grow their own food and have fewer or no bills to pay, unlike the urban poor who are entirely dependent on the cash economy. The current inflation rate, now running, as we have already seen, at 135%, has rendered most urban incomes worthless. It was not suprising that an Oxfam study noted that: "the rising poverty among the young is perhaps the most pressing urban social problem in Zambia today".

Urbanization also brings about anonymity which, in turn, probably encourages crime as it makes detection difficult. It also loosens social control and the over-crowding it brings about may undermine the existing social order. As seen in chapter 3 over-crowding is most serious in site and service, squatter and up-graded squatter areas: these amount to only 26% of the area of Lusaka, but house 68% of the total population. It was hardly suprising that 64% of the imprisoned offenders in this study lived in those areas at the time of the offence.

8:7 (b) The Background Characteristics of Offenders.

As seen in chapter 3, there may not be a direct relationship between crime on the one hand and the lack of education and

employment on the other. Clifford has pointed out, however, that: "frustration, the aimlessness of wandering the streets, the opportunities for urban deviation or living by one's wits",¹⁰⁰ which are all effects of unemployment, may be connected with the breeding of crime in the towns. It is not therefore a surprise that 42.5% of respondents in the victimization study already referred to felt that the way to control property crime was by increasing opportunities for legitimate activities, especially¹⁰¹ employment.

In Zambia many people believe that education guarantees employment and escape from the poverty in which many are trapped. In this study many offenders had low levels of education which severely affected their chances of employment. As seen in chapter 3 (Table 10), 52% of the interviewed offenders had only completed 7 years of education or less, 26% had completed 10 years and 11% had completed 12 years of education. Only 1% of the offenders had been to university and 9% of them had never been to school at all. On the other hand, 40% of the imprisoned offenders whose case records were studied and 41.8% of the interviewed offenders were unemployed at the time they committed the offences.

Other criminogenic factors were characteristic of the offenders in this study. Seventy percent of the interviewed offenders and 80.1% of imprisoned offenders (from case records) were aged between 18-31 and 17-31 years respectively. According to the United Nations' studies, the criminogenic potential of unemployment is more likely to be manifested when other

criminogenic factors such as age, urban anonymity and poor living
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conditions are also present. It was discovered in this study that
over 70% of the unemployed offenders from both samples were under
31 years of age. The vast majority of offenders were in the
lowest social-economic strata as indicated by their area of
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residence before they committed the offence (see chapter 3).

8:7 (c) The Role of the Social Services Sector.

In view of the social circumstances surrounding the offenders,
a new approach to crime prevention must be broadly based. More
emphasis must therefore be placed on breaking the circle of
poverty, by linking crime prevention activities with the
activities of the social services organizations, particularly
those which provide vocational training and employment
opportunities to the youth. It is suggested that this link be
forged with the Small Industries Development Organization (SIDO).
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SIDO was created in 1982 through an Act of Parliament as a
government assistance programme to small scale industries. At
the moment, SIDO's activities concentrate on retired people. But
its functions and structure as spelt out in the Act make it
better placed than any other organization to incorporate crime
105
prevention into its normal activities.

The methods of attack and the motivation for crime, discussed in
chapter 3 should also be considered. Each offence must be
carefully analysed by examining its typical attack methods,
typical preferred times of attack and motives behind its
commission and incorporate this information in prevention
106
strategy. But the question of how much emphasis should be placed

on the target hardening as a crime prevention strategy is difficult determine. Too much emphasis on this approach may divert attention from the social factors associated with property crime (which must be tackled) and may also, in the long run, become a burden on victims.

As for theft by servants, in which the underlying factor is job dissatisfaction and poor employer/employee relationship, employers themselves can play a major role in its prevention. Few Zambian employers ever try to keep their employees contented and informed about work programme and career prospects if any. Contentment of workers usually brings about honesty. An effort must be made to reverse this trend. In addition, a profit sharing scheme in which employees are given a percentage of the profit made each year may reduce the incentive to act dishonestly with the employer's property.

In the case of most thefts, public campaign by the suggested crime prevention unit, through radio and TV broadcasts, newspaper advertisements and pamphlets alerting potential victims, in conjunction with better supervision of car parks, could be effective.

8:7 (d) The Role of Research.

Research into property crime trends and the evaluation of existing control measures should be an integral part of crime prevention strategy. At the moment, there is little collaboration between researchers and policy makers. The main reason is that the criminal justice sector, particularly, the police and to a

certain extent, the prisons are not keen to cooperate with researchers. They regard them as "outsiders" whose interest is to "interfere" with or "criticise" their work. The other problem has been that criminal justice as a field of research is new and there is no local expertise in the area. It is hoped that in future, the research community at the University of Zambia, particularly the proposed Institute of Criminology , will work closely with policy makers on the one hand and the criminal justice sector on the other.

Data collection methods by the police and the courts should also be improved. Particular attention should be paid to the storage of data so as to prevent the loss or misplacement of records. The use of computers could greatly assist in this regard.

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8:8 Conclusion.

This chapter has shown that, contrary to all expectations, the police have not taken a leading role in crime prevention. This is a result of police operational problems, which themselves arise out of government under-funding of the police force. It has also been shown that there is some confusion or the lack of coordination on the implementation of the official "policy" on crime prevention. On the one hand, the legislature pursues deterrent aims in the form of minimum sentence legislation, on the other, courts and prisons are supposedly expected to implement the official aim of rehabilitation of offenders although in practice they both pursue the deterrent aim of crime prevention. On the whole the official strategy for crime prevention is therefore based on a "law and order" approach in

which the answer to the crime problem is thought to lie in the enactment of stiffer penalties. But as Walklate has pointed out in England, this approach has "discouraged the view that wider social problems are in any way connected with criminal behaviour"¹⁰⁹. In any case evidence in study shows that none of these policies has worked as evidenced by the high rate of recidivism and the rising crime rate.

The failure of the police to devise a viable crime prevention strategy has, in a sense, led to the growth of three institutions as a public response to the problem of crime. At one extreme end of the scale, we have the illegal instant justice mobs. At the other extreme end is the well organised and police supported neighbourhood watch scheme. In the middle there is the para-legal and police despised vigilante scheme. There is little evidence, however, that these three public responses to crime have had any success in crime prevention, except the neighbourhood watch scheme to a limited degree.

It must be recognised that crime prevention is not the responsibility of the criminal justice sector alone, but is equally the responsibility of the community and the social services sector. But community participation in crime prevention should not be the result of failure by the criminal justice sector to play its role. In other words, public participation should supplement official effort and not fill the vacuum created by the lack of official action. Professor Reiner has pointed out in England that:

"The mandate of crime prevention should mean not only that

the police engage in the traditional technique of patrol and detection. They should collaboarte with other social agencies and government to tackle the underlying social causes of crime as well as the symptoms".110.

What is needed for Lusaka and for Zambia as a whole is a "multi-
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agency" approach to crime prevention. The first step in that direction is to make the police the centre of crime prevention activities. That would require radical changes in the Zambia Police Force (in the areas of recruitment, training and supervision, and accountability). The next step should be the formation of crime prevention units at all Police Stations. That unit should then form a link between the police on the one hand and the public (neighbourhood watch scheme) as well as the social services (SIDO) on the other. Chapter 9 expands further on this.

Notes

1 P.J.Brantingham and F.L.Faust, "A Conceptual Model of Crime Prevention" Crime and Delinquency, 2, : 3 284-296, (1976).

2 See P.L O'Block, Security and Crime Prevention, Toronto, 1981, 5. see also C.R Jeffrey, Crime Prevention Through Environmental Design, London, 1977, 20.

On the other hand, the United States Consultative Group has developed a different model for the understanding and implementation of crime prevention programme. They divide crime prevention activity into three categories: primary, secondary and tertiary. Primary crime prevention means the identification and alteration of physical and social circumstances in the community which provide opportunities for crime. Secondary crime prevention means the identification of potential criminals (and factors associated with criminality) and protection of persons who are exposed to crime. Tertiary crime prevention is the concentration of efforts on the prevention of recidivism. See J.J.Jacobs "Community Programmes for the Prevention of Crime", in C.M.B Naude and R.Stevens (eds) Crime Prevention Strategies, Pretoria, 1988, 47.

3 See T.Bennette and R.Wright, Burglars on Burglary, Aldershot, 1984, 19.

4 M.B.Clinard and D.J.Abbott seem to suggest that an effective crime prevention approach should allocate responsibility to specific institutions in order to avoid a "multiple factor" approach, op cit, 264.

5 S.Edelman and W.Rowe, "Crime Prevention from the Justice Perspective: A Conceptual and Planning Model" Canadian Journal of Criminology, 25 : 4, 391-398.

6 See D.T.Crowe, B.R.Bommar, R.W.Mellard and J.A.Mele, Understanding Crime Prevention, National Crime Prevention Institute, Boston, 1986, in which the authors have adopted the "before the fact" definition of crime prevention.

7 "Criminal justice sector" means institutions in the criminal justice system, in this case the police, courts, and the legislature. "Social services sector" means both governmental and non-governmental organizations involved in the provision of social services particularly youth training.

8 See, C.M.B Naude "Approaches to Crime Prevention", in C.M.B.Naude and R Stevens (eds), op cit, 18-20.

9 T.D.Crowe, B.R.Bomar, R.W.Mellard and J.A.Melle, op cit, chapters 5,6,7 and 8. Crime prevention through environmental design does not only mean an architectural design of houses and other buildings in such a way that the targets are made more difficult, but it also involves changing the behaviour of

potential victims as well as conducting regular patrols. Thus it has been pointed out that one way of preventing theft of a car radio cassette is to remove it when the car is parked. See, M.M.Globbelaar, "Crime Prevention, Environmental and Architectural Planning", in C.M.B.Naude and R.Steves, (eds) ,op cit, 197.

10 The national media especially newspapers have always carried news about the activities of the anti-robbery squad. The following are some of the reports:

"A man was shot dead on Sunday by Lusaka police while trying to escape from a lawful arrest for a suspected theft of a motor-vehicle". Times of Zambia, Wednesday, April 11, 1990.

"Two men were shot dead by police on Thursday in Ndola (Copperbelt) while attempting to take a stolen ambulance into Zaire". Zambia Daily Mail, Monday April 16, 1990.

"Police shot dead two suspected burglars yesterday, foiling a huge haul at a leading fashion shop in Lusaka" Times of Zambia, Thursday November 1, 1990.

"Lusaka Police shot dead one suspected thief on Monday night at the Premium Oils Plant. The Police chief said later that it would have been better if he had only been maimed because he would have been in position to help with investigations" Times of Zambia, Wednesday January 23 1991.

11 See E.W.Smith and A.M.Dale, op cit, 396 and C.R.Cutshall, op cit, 18.

12 R.C Cusshall, ibid, 18.

13 Zambia Police Annual Report, 1986, 2.

14 See Zambia Police Annual Report, 1988, and Crime Return, Lusaka Division 1988, Z.P. Form 85.

15 In England, the clear-up rate for theft and handling is about 40%, while that for burglary and robbery is around 33%. See R.Reiner, op cit, 1984, 120, quoting The Report of Her Majesty's Inspector of Constabulary, 1982, 97 (Table 4:3).

16 K.T.Mwansa, op cit, 1985, 327.

17 Ibid, 329.

18 See, F.Odekunle "The Nigerian Police Force: A Preliminary Assessment of Functional Performance" International Journal of the Sociology of Law, (1979) 7, 66.

19 In Tanzania, the minimum sentence has a wider application. It covers theft by a servant, robbery, house breaking, receiving stolen property and attempting to commit any of the above offences. It also covers stock theft, being in possession of stock suspected to have been stolen, trespassing with intent to steal stock, being near stock in suspicious circumstances, passing through, over or under or tampering with fences around

a stock enclosure and any offence relating to brands contrary to section 7 of the Stock Theft Ordinance. Sentences for these offences range from 6 months to 3 years. See J.S.Read, op cit, 1965, 36-37.

In Malawi, theft by public servants is among the offences subjected to a minimum sentence and punishment ranges from 2 years to life imprisonment. See C.Ng'ongola, op cit, 72.

20 There is no uniformity between the police and court's compiled statistics as contained in their Annual Reports. Court returns, in addition lack consistency. The Zambia Police's Z.P Form 85 for "Cases Reported to and Dealt with by the Police" contains a "robbery" column for both robbery and aggravated robbery. The same applies to Z.P Form 85(a) for "Persons Dealt with by the Courts".

On the other hand, court returns contained in SC 36 Form have got "aggravated robbery" column for both offences. That seemsto have been the case up to 1984. The SC 36 Form for 1985 and 1986 has got no aggravated robbery column at all. For those two years, robbery and aggravated robbery statistics came under the general category- "other". As for 1987 Judiciary Annual Report the SC 36 Form itself is missing. In other words the 1987 Annual Report does not contain any court returns.

21 See J.Hatchard, op cit, 1985, 487 (Table 2).

22 On 4th. January, 1968, the same paper had reported: "Early on Saturday, 3 shots were fired when 4 men, one of them armed tried to break into Diamond's Super market. They were disturbed by a security guard. Early on Monday, 6 men, one of them armed tied up a watchman, drove him into the bush and later broke into Garnerton Butcheries in Kitwe".

23 Hatchard, op cit, 1985, 487 (Table 2).

24 Times of Zambia, March 18, 1974.

25 Times of Zambia, February, 29 1973.

26 Zambian Hansard, Parliamentary Debates, 23rd July-2nd August, 1974, 214.

27 Hatchard, op cit, 1985, 491 (Table 4).

28 Section 281A of the Penal Code.

29 Section 10 of the Penal Code Amendment (No 2) Act No 29 of 1974.

30 Hatchard, op cit, 1985, 491 (Table 4).

31 Ibid, 491.

32 At a Kitwe Police seminar, the city police chief revealed that some local businessmen were conniving with criminals to

steal motor-vehicles for sale in the neighbouring Zaire. See Times of Zambia, June 30th, 1990. The writer had a personal experience with this problem. In 1986, three Land Cruisers were stolen from the University of Zambia workshop. The writer was asked to chair a disciplinary committee to hear a case of "negligence of duty" against two security guards. Evidence made available to the committee from various sources showed that the vehicles were driven into Zaire in a convoy within 10 hours of the theft.

33 Section 4 of the Penal Code (Amendment) (No.2) Act No 1 of 1987.

34 That is, theft of a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ram, ewe, wether, goat or pig or the young of those animals.

35 Hatchard, op cit, 1985, 489 (Table 3).

36 Ibid, 489, see also the Penal Code Amendment Act, 1970.

37 Ibid, 498 (Table 3).

38 The Hon. J.M.Mwanakatwe M.P for Mpulungu, Zambian Hansard, op ci, 303-304.

39 The Hon. J.Lumina, M.P Minister of State for Rural Development. Zambian Hansard, op cit, 291.

40 The Hon. M.Chona, M.P, Minister of Legal Affairs and Attorney General, Zambian Hansard, op cit, 312-313.

41 Section 8 of the Penal Code Amendment (No2) Act No. 29 of 1974. Supporting this amendment, one M.P recounted his own experience saying that at one time he had gone to Livingstone (a southern town) to defend two clients. In the morning, it was a murder case later reduced to manslaughter. His client was sentenced to 9 months imprisonment, back-dated to the time of arrest and since he had been in remand prison for more than 9 months, walked out of court as a free man. In the afternoon, it was a stock theft case involving a goat. His client was convicted and sentenced to 7 years imprisonment. The Hon. W.Mun'gomba M.P for Mporokoso. Zambian Hansard, op cit, 304-305.

42 Section 3 of the Penal Code (Amendment) (No.2) Act No.1 of 1987.

43 Table 40 contrasts sharply with the sentence length in Kenya. A study by Kercher found that between 1976-1978, 15% of prisoners nation-wide were sentenced to a term of less than one month, 33% to between one month and less than 3 months, 33% to between 3 months and less than 6 months, 5% to between 6 months and less than 12 months, 6% to between 12 months and less than 18 months, 4% to between 18 months and less than 3 years and 4% to over 3 years. See Kercher, op cit, 146, Fig 3. Thus while in

Kenya during the period mentioned above, the sentence length of 6 months and below accounted for 81% of the sentences imposed, in Zambia, for the period shown in Table 40, that sentence length accounted for an average of 26% only. Similarly, while the sentence length of 18 months and above accounted for only 8% of the sentences imposed in Kenya, it accounted for 18% of the sentences in Zambia.

44 Professor Ashworth has shown that in England and Wales, only 7% of the total offences finally reach the sentencing stage and adds: "...the notion that sentences affect the crime rate as a whole is as far far-fetched as is the notion that prison sentences imposed by courts offer any very great protection to the public at large. So much crime is committed by criminals not in prison that the contribution of imprisonment to general public safety is minimal. The risk that any of us will be burgled or assaulted is hardly affected by the fact that the prison population is 50,000 rather than 25,000". A.Ashworth, op cit, 1989, 10.

45 B.W.Ewart and D.S.Pennington, op cit, 594.

46 K.D.Kaunda, Humanism in Zambia and a Guide to Its Implementation Part II, Lusaka, 1984, 27. When he opened the first ever seminar for judges and magistrates in Lusaka on 23rd August, 1987, the President said inter-alia "...emphasis should be on rehabilitating convicted people instead of long prison sentences", see Times of Zambia, Monday August 24th 1987, Zambia Daily Mail, Monday August 24th 1987.

47 F.A.Allen "Criminal Justice, Legal Values and Rehabilitative Ideal" 50 Jo. Crim.Law.Crimin.PS. 226.

48 R.Martinson, "What Works-Questions and Answers About Prison Reform" The Public Interest, 1974 (Spring) 22 and A.K.Bottomley, Criminology in Focus, London, 1974, chapter 4.

49 Bailey, for instance has concluded that "rehabilitation had little effect on corrective treatment" W.C.Bailey, "Correctional Outcome: An Evaluation of 100 Reports" 57 Jo.Crim.Law.Crimin.PS. 153, see also D.Lipton, R.Martinson and J.Wilks, The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies, London, 1977, A.E.Bottoms and F.H.McClintock Criminals Coming of Age, London, 1960, R.Cross and A.Ashworth, op cit and A.von Hirsch, Doing Justice: The Choice of Punishments, Report of the Committee for the Study of Incarceration, New york, 1976.

50 As chapter 3 shows, 38.4% of the offenders in the case record sample were convicted of theft by servants and by public servants.

51 According to Uusitalo, "recidivismis, besides secondary deterrence, the main criterion for evaluating the success of penalties" P.Uusitalo, "Recidivism After Release from Closed and Open Penal Institutions" 12 Brit.Jo.Crim, 211. (1972).

McQuoid-Mason appears to agree with Uusitalo when he says: "High recidivism rates indicate that prisons have become breeding places for crime" D.J.McQuoid-Mason, "Solving the Crime Problem: Prevention or Rehabilitation? Possible New Directions" (1981) 5 South African Journal of Criminal Law and Criminology, 11

On the other hand, Lipton, Martinson and Wilks have taken a different view. They say that "reconviction rates are an unsatisfactory measure of success. They fail to take into account other factors such as success in other spheres of the offender's life, eg, domestic or job stability, fluctuations in police discretion, undetected crime and incomplete police records. They also point out that "much happens outside the treatment area which is not always measurable, eg, the offender's background environment and previous response to treatment". Op cit , 12.

This study takes the view that recidivism is the proper measurement of the effectiveness of punishment. Its only problem is that due to the nature of official records, it is not possible to isolate the recidivism rates for property offences.

52 Lower recidivism rates have been reported in other countries. In Kenya for example, the average rate for 1972-1974 was 2.8%. This low rate was attributed to the successful rehabilitation measures, see Kercher, op cit, 261, quoting the 1974 Prisons Department Annual Report, Kenya. But such low rates of recidivism may also be attributed to different systems of calculation. In Zambia recidivism is calculated by dividing the number of all recidivists by the number of all prisoners admitted in a given year. In Kenya it is calculated by dividing the number of convicts sentenced in a given year for the second and subsequent times for "serious offences" (those punishable by 2 years imprisonment or more) by the total number of convicts for all offences. Kercher, ibid, 261. The same writer has observed that "there may be a considerable gap between claims of prison reform in Kenya and verifiable proof of such rehabilitative success". Ibid, 262-263.

53 K.M.M.Likando, op cit, 105.

54 See D.A.Thomas, op cit, 1980, 17-25.

55 As for the situation in many states in the United States of America, Frosh writes: "...in every case where the sentence is to be imposed on a prisoner, after his or her conviction, parole or probation department prepares an extensive study of the background of the prisoner. The study includes everything relevant about the prisoner's life: his family status, description of crime, education, employment, religion and other backgrounds together with recommendation as to the kind and quality of sentence to be imposed". S.B.Frosh "Constructive Alternatives to Prison Sentencing" (1982) 6 South African Journal of Criminal Law and Criminology , 21.

As for the position in England and Wales, see Cross and Ashworth, op cit, 95 who term the background information about the offender as "antecedents report". See also S.White, "The Effect of Social

Enquiry Reports on Sentencing Decisions" 12 Brit.Jo.Crim, 230, (1972).

56 See for instance, Shawa (theft) interviewed on 17th August 1989, Yeyenga (theft) interviewed on 13th October, 1989, Simutowe (house breaking) interviewed on 25th September 1989.

57 K.M.M.Likando op cit 58-59. In Kenya, Kercher found the following obstacles to rehabilitation:

a) Many inmates are apathetic and resistant to being reformed for they have little or no sense of having done wrong.

b) Many convicts incarcerated in a conventional prison in Kenya are in effect banned from the real world of the resocializing influences of their reference groups- family, community and friends to which society expects them to return in the end and as reformed.

c) The incompatible mix of diverse penal objectives and methods tends to neutralise reform effort. The elemental requirement of secure custody, rigid discipline, unthinking obedience to authority, regimentation, restricted social controls etc, are essentially incompatible with those conditions most conducive to rehabilitation -growth of self-discipline and freedom of choice, mutually respectful relations between inmates and disciplinary staff and meaningful contact with inmate's reference groups in free society. Op cit, 259.

Professor Ashworth has pointed out that prison staff cannot prevent brutal exchange between prisoners: the passing of criminal know-how from one inmate to another which leads to the spread of new ideas and sometimes to the planning of fresh crimes involving several prisoner, the cutting off of individuals from the outside world from family, friends, employers and others- all inflict psychological damage. The prison sub-culture works against official attempts to change the character of offenders. A.Ashworth, op cit, 9.

58 Tanner has suggested a link between self-perception as a criminal and the possibility of reform. Few prisoners in East Africa see themselves as criminals. Most of them are of the view that they are in prison because of bad luck, because they had no money for a lawyer or because the governments make laws and enforce them without any regard for popular support, see R.E.S.Tanner "Penal Practice in Africa- Some Restrictions on the Possibility of Reform" The Journal of Modern African Studies, 10; 3 (1972) 452.

59 See, for instance, the English Rehabilitation of Offenders Act 1974.

60 See B.W.Ewart and D.S.Pennington, op cit, 594.

61 N.Walker, "The Efficacy and Morality of Deterrents" [1979] Crim.L.R, 131.

Deterrence has also been defined as "...any measure which acts to prevent crime is a deterrent...criminal deterrent refers to crime prevention only when this is achieved by threatening consequences (arrest, trial, conviction and penalties) which the

prospective law breaker is unwilling to risk", see D.Walsh and A.Poole (eds), op cit, London, 1983, 68.

62 D.E.Lewis, "The General Deterrent Effect of Longer Prison Sentences" 26 Brit.Jo.Crim, 47 (1986).

63 D.E.Lewis, ibid, 47.

64 According to Frosh "mandatory sentencing does not allow for the fact that every human being, as well as every offence may be different", op cit, 19.

65 Op cit, 131.

66 D.E.Lewis, op cit, 49. Similarly, D Beyleveld has pointed out that "recorded offence rates do not vary inversely with the severity of penalties, usually measured by the length of imprisonment" A Bibliograph on General Deterrence Research, London, 1980, 306. See also J.P.Gibbons, Crime Punishment and Deterrence New York 1975. He examined the severity and duration of punishment for robbery and other offences and found no evidence of effectiveness of deterrence, 145.

Kercher has pointed out that studies and experience generally indicate that the effectiveness of deterrence is differently related, among other things to various categories of crime, to the particular type of penalty or a combination of penalties imposed, to different types of offenders and to a mix of diverse environmental factors, op cit, 243.

67 T.Bennette, "Factors Related to Participation in Neighbourhood Watch Schemes", 29 Brit.Jo.Crim, 208. (1989).

68 In England it has been found that people who are likely to participate in neighbourhood watch schemes are those of the middle class or lower middle class background and that the scheme is more popular in areas where crime is seen as an external threat to those areas. See S.Walklate, "Victims, Crime Prevention and Social Control", in R.Reiner and M.Cross, (eds), Beyond Law and Order, Criminal Justice Policy and Politics into the 1990s, London, 1991, 210-211.

69 Interview with Chief Inspector Kapembwa of Kabwata Police Station, 15th November, 1989.

70 Clarke has demonstrated what might happen if crime prevention strategy does not take into account the displacement effect. In West Germany 1963, steering column locks were made compulsory on all cars, old and new. There was a 60% reduction in the offence of taking and driving away. In 1971, steering column locks were introduced in England and Wales but only on new cars. The overall levels of car taking have not yet dropped because the risk to old cars had increased as a result of displacement, see R.V.G.Clarke, "Situational Crime Prevention" 20 Brit.Jo.Crim, 142. (1980).

71 Most studies on the relationship between crime rate and the level of policing have been inconclusive. For instance, a study in Kansas City (U.S.A) found no significant relationship between increasing car patrol or the beat with crime levels. See G.Kelling, et al, The Kansas City Preventive Patrol Experiment, Washington D.C. 1974.

But any form of patrol is a deterrent measure, especially in Lusaka where offenders have to travel long distances to commit such crimes as burglary and the distance they have to cover in order to get to safe houses to deposit stolen goods (see chapter 3).

72 Monitoring Report of the Defence and Security on the Implementation and Administration of the Vigilante Scheme in Southern, Copperbelt, Lusaka and Luapula Provinces, op cit, 1. This study involved 22 Districts, covering 56 Police Stations in the affected provinces. Meetings during the study were held with police officers-in-charge, vigilante supervisors and party officials at District, Ward, Branch and Section levels.

73 Section 49 of the Zambia Police Amendment Act, No 23 of 1985. But it must be pointed out that the scheme started long before 1985. In 1970s it operated as a wing of the Party's Youth League under the name of "party militants". They used to perform law enforcement functions but without any form of legal recognition. The 1985 Act therefore did not really establish an entirely new institution in the vigilante scheme. It is partly for this reason that the vigilante scheme is discussed here and not under the Legislature. The other reason is that, unlike the other legislative attempts discussed above, the vigilante scheme is not really regarded as a legislative attempt at crime prevention. Rather, it is regarded as a Party's effort to prevent crime, as we shall see later.

74 Section 52(2) of the Zambia Police Amendment Act, 1985.

75 For a definition of a felony, see section 4 of the Penal Code.

76 Interview with Detective Chief Inspector Sampa, Lusaka Central Police Station, 13th November, 1989.

In April 1990, it was disclosed by a senior Party official that a large but an undisclosed number of vigilantes had been fired from the scheme for being involved in criminal activities. They were accused of selling goods seized from illegal traders and pocketing the proceeds of the sale. He advised members of the public to report any illegal activities by the vigilantes to the Party (and not to the police), A.Kwibisa, Political Secretary at the Party Headquarters, see Sunday Times of Zambia, April 8 1990. Poor record keeping of criminal statistics by both the police and courts makes it difficult to ensure that all vigilantes have no criminal records. (brackets are the writer's).

77 Monitoring Report, op cit, 4.

78 See for instance Kandiata, (theft from the person), interviewed on 7th September 1989, Shawa, (theft) interviewed on 17th August 1989, C.Mbao, (burglary) interviewed on 4th October 1989, Tembo, (burglary) interviewed on 12th September 1989.

79 Interview with Detective Inspector Mashabe, Matero Police Station, 16th November 1989.

80 See Zambia Police Annual Reports for Lusaka. Column 6 of ZP Form 85 "Cases Reported and Dealt with by the Police" is entitled "False, withdrawn, charge refused..."

81 In the past, there have been stories of ward chairmen of the Party setting up "courts" where they "try" cases and impose punishment, usually caning, see K.T.Mwansa, "AComment on the Zambia Police Amendment Act No 23 of 1985" 18 Zambia Law Journal, 1965, 113.

82 One of the recommendations made in the Monitoring Report, was that "efforts should be made to recruit vigilantes in high cost areas where the scheme is shunned", op cit, 6.

83 M.K.Chilala, "Instant Justice and the Law in Zambia", in R.Robins and K.Rennie (eds), Social Problems in Zambia Vol I University of Zambia, Lusaka, 1976, 35.

84 Ibid, 35.

85 Interview with Detective Inspector Mashabe, on 15th. November, 1989. On Wednesday, January 23rd 1991, the Times of Zambia carried this story: "A suspected burglar who was brought to Kitwe Central Hospital after an instant justice mob battered him and left him for dead, has now died. The suspect was caught by residents as he was about to leave the house with the loot".

86 J.Hatchard, op cit, 1985, 499.

The problem with some of those measures such as high walls etc, is that connivance of offenders with guards and other workers on the premises sometimes ensures conventional entry, rendering the measures ineffective.

Instant justice may be seen as a defence of property. That defence envisages a situation where official help is not available. The law on defence of property is that the owner should not retreat if by doing so he would put his property in more danger, (Lembekani Mwale V R. 1958 R & N 327) The owner therefore is not expected to wait for the attacker to actually seize the property before acting to defend it- it may be too late. The defence extends to one's property and that of others. What distinguishes instant justice from the defence of property is that its aim goes beyond protection of property. Its aim is to punish the suspect and that's why it is illegal.

87 M.K.Chilala , op cit, 39.

88 K.T.Mwansa, op cit, 1985, 328.

- 89 F.M.Ssekandi, "Kondoism in Uganda: A Study of the Methods Used to Contain Kondo Violence" 1 (4) Uganda Law Focus, 231.
- 90 M.K.Chilala, op cit, 39.
- 91 Ndulo has, for instance, called for the abandonment of deterrence, see M.Ndulo, op cit, 1977, 33.
- 92 A.P.Wood, "Population Growth, Migration and Development in Zambia" in K.Osei-Hwedie and M.Ndulo (eds) op cit, 1985, 192.
- 93 Zambia 1980 Census of Population and Housing, Preliminary Report, Central Statistical Office, Lusaka, 1981, 3.
- 94 A.P.Wood, "The Population of Lusaka" in G.J.Williams (ed) Lusaka and Its Environs, Lusaka 1986, 167.
- 95 M.Burdatte, op cit, 43.
- 96 Ibid, 43.
- 97 J.Clark with C.Allison, op cit, 28.
- 98 A.B.Booth, D.R.Johnson and J.N.Edwards, "In Pursuit of Pathology: The Effects of Human Crowding" 45 The American Sociological Review, 1980, 873-878.
According to Clinard and Abbott the city offers greater opportunities for theft and greater possibilities of collaboration with other offenders and with fences for the disposal of stolen property. In addition, urban areas generate the motivation, rationalization, skill and low risk of detection, see op cit, 255.
- 99 It has been pointed out for example, that the effects of unemployment are more likely to be apathy, mental illness, stress, and drunkenness other than crime per se, see M.P Feldman, Criminal Behaviour: A Psychological Analysis, London, 1977.
- 100 W.Clifford, An Introduction to African Criminology, Nairobi, 1974, 178.
- 101 K.T.Mwansa, op cit, 1985, 325-326. Other responses to the item: "suggestions on how to control property crime" were:, long prison sentences 10%, increase in police visibility/patrols 20%, repatriation of offenders to rural areas 1%, improvement in police-public relations 14%, disruption of channels of stolen property 5%, increase in precautinary measures by the would be victims 10%. This is the sociological crime prevention model which has a wide support in the United States of America. A survey in that country showed that 61% of the public were of the view that negative social conditions were responsible for crime. A large section of the American public therefore favours the improvement of the social and economic conditions (inter-alia) as a crime prevention strategy, see A.Podolofsky, Case Studies in Community Crime Prevention, Springfield, Illinois, 1983, 29, 39.

It has been pointed out, however, that improvements in the social circumstances of offenders/would be offenders or the provision of education and widespread employment may not necessarily lead to crime reduction, see R.C.Jeffrey, op cit, 149. See also Clinard and Abbott, op cit, 264. On the other hand, there are studies which have established a correlation between community prevention programmes and reduction in crime rate, see for instance, D.P.Farrington, "Delinquency Prevention in the 1980s" Journal of Adolescence, 1985, 3-16, and S.Wheeler and L.S.Cotrell, Juvenile Delinquency: Its Prevention and Control, New York, 1966, 19.

102 United Nations Committee on Crime Prevention and Control, 8th Session, Vienna 12-30 March, 1984.

103 A South African researcher has reported that "low income, poor education and inadequate or squalid living conditions are criminogenic in a high degree", H.J.Steyn, "Public Participation in the Prevention of Crime" (1971) 88 South African Law Journal, 214.

104 Small Industries Development Act, Cap 713 of the Laws of Zambia.

105 SIDO's functions are spelt out in section 6 of the Act as follows:

- to formulate, coordinate and implement national policies and programmes relating to the development and promotion of small industries,
- to carry out research projects, surveys, market research on any aspect connected with small industries,
- to provide or assist in providing training facilities for persons engaged or employed or to be employed on small industries and coordinate the activities of other institutions engaged in such training,
- to provide extensions, management and consultancy services for small industries,
- to promote local and foreign investment in small scale industries,
- to assist in procuring, obtaining or providing supplies, equipment or new materials for small scale industries,
- to assist in locating and developing industrial estates, common facility centres and ancillary service.

Under section 14 of the SIDO Act, SIDO funds consist of money to be appropriated by Parliament, grants or donations.

106 T.D.Crowe et al, op cit, 159.

107 See, R.Stevens, "The Prevention of Crime in Commerce and Industry" in C.M.B.Naude and R.Stevens (eds) op cit, 216.

108 As seen in chapter 5, some defendants had their cases withdrawn in court by the police because they (the police) could not trace their records. See also Zambia Daily Mail report on Wednesday August 8 1990 entitled "7 Case Records go Missing".

109 Walklate, op cit, 208.

110 R.Reiner, 1984, op cit, 113.

111 Multi-agency approach to crime prevention has been described in the following terms: "...in as much as crime within local communities is likely to be sustained by a broad range of factors- in housing, education, recreation, etc,- the agencies and organizations who are in some way responsible for, or capable of affecting those factors, ought to join in common cause so that they are not working at cross purposes or sustaining crime inadvertently." Walklate, op cit, 211 quoting T.Hope and M.Shaw, "Community Approach to Reducing Crime" in T.Hope and M.Shaw (eds), Communities and Crime Prevention, London, HMSO, 13. Later Walklate expands on this approach and states: "This framework embraces a number of critical issues in the context of community crime prevention. First, it starts from the premise that tackling criminal victimisation and the fear of crime is the responsibility of a broad base within the community: formal agencies, informal agencies, and community networks...", op cit, 213.

TABLE 39 THE PROPORTION OF UNDETECTED OFFENCES IN LUSAKA FOR 1988

OFFENCE	REPORTED CASES	UNDETECTED CASES	% OF UNDETECTED CASES.
Burglary	3262	2352	72
House Breaking etc	2896	2290	79
Theft of motor-veh	568	321	57
Theft by servants/ public servants	1394	724	52
Stock Theft	338	242	72
Theft from a motor- vehicle	5592	4403	79
Theft from the person	764	469	61
Robbery	1230	738	62
Total/Average	16, 044	11,545	72

SOURCE: Adapted From Zambia Police Annual Report.

TABLE 40

SENTENCE LENGTH 1980-1986 ALL OFFENCES

	1980		1981		1982		1983		1984		1985		1986	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%
Weekend Imprisonment	10	.08	3	.02	1	.04	2	0.02	-	-	3	0.02	2	0.02
Under One Month	655	5.47	457	4.15	584	5.60	916	7.76	1,027	9.53	801	6.83	836	6.96
One month and under 3 months	861	7.20	739	6.71	745	7.15	1,107	9.38	866	8.04	1,230	11.55	970	8.08
Three months and under 6 months	1,976	16.51	1,601	14.54	1,533	14.71	1,661	14.07	1,616	14.99	1,701	15.63	1,769	14.74
Six months and under twelve months	3,638	30.40	2,995	27.19	2,931	28.13	3,086	26.13	2,836	26.31	3,416	27.15	3,386	28.20
Twelve months under under eighteen months	1,847	15.44	1,980	17.98	1,849	17.74	1,861	15.76	1,644	15.25	1,784	16.26	2,433	20.27
Eighteen months and over	2,979	24.90	3,239	29.41	2,775	28.63	3,173	26.88	2,789	25.88	2,167	22.55	2,609	21.73
TOTAL	11,966	100.00	11,014	100.00	10,418	100.00	11,806	100.00	10,778	100.00	11,102	100.00	12,005	100.00

SOURCE: ZAMBIAN PRISON DEPARTMENT ANNUAL REPORTS

TABLE 41

SENTENCE LENGTH PER OFFENCE CATEGORY FOR INTERVIEWED OFFENDERS
(EXCLUDING THOSE CONVICTED FOR AGGRAVATED ROBBERY, STOCK AND MOTOR VEHICLE THEFT)

SENTENCE LENGTH											
Offence Category	Imprison-ment in lieu of Fine	1 month & under 3 months	3 months & under 6 months	6 months & under 12 months	12 months & under 18 months	18 months & under 2 years	2 years & under 2½ years	2½ years & under 3 years	3 years & under 3½ years	3½ years and above	TOTAL
Theft (from the person from motor vehicle etc)	2 (11.76%)	-	-	4 (23.52%)	3 (17.64%)	1 (5.8%)	6 (35.29%)	-	1 (5.88%)	17 (99.97%)	
Theft by servants and by public servants	-	-	-	6 (18.18%)	13 (39.39%)	9 (27.27%)	1 (3.03%)	-	4 (12.12%)	33 (99.99%)	
House Breaking	-	-	-	1 (10%)	-	2 (20%)	1 (10%)	-	4 (40%)	10 (100%)	
Burglary	-	-	-	2 (10%)	-	2 (10%)	1 (5%)	-	13 (65%)	20 (100%)	
Robbery	-	-	-	-	-	-	-	-	1 (20%)	4 (80%)	5 (100%)
TOTAL	2 (2.35%)	-	-	13 (15.29%)	16 (18.82%)	14 (16.47%)	9 (10.58%)	-	23 (27.05%)	85 (99.97%)	

TABLE 42

**SENTENCES PASSED ON PERSONS CONVICTED OF PENAL CODE
OFFENCES NATION-WIDE 1984-1988 (IN PERCENTAGES) - ALL COURTS**

OFFENCE	SENTENCE	1984	1985	1986	1987	1988
I Offences against public order.	Death	-	-	-	-	-
	Imprisonment	8.3	10.3	10.5	5.2	3.3
	Caning	0.6	0.3	3.0	0.2	0.1
	Fine	90.7	89.1	86.0	94.0	96.2
	Other	0.4	0.3	0.5	0.6	0.4
	TOTAL	N= 9014 (100%)	N= 7288 (100%)	N= 5673 (100%)	N= 4601 (100%)	N= 7061 (100%)
II Offences against lawful authority.	Death	-	-	-	-	-
	Imprisonment	70.7	86.9	76.0	78.1	86.9
	Caning	4.0	8.9	14.0	8.2	-
	Fine	21.3	2.6	5.7	13.3	12.7
	Other	4.0	1.6	4.3	0.4	0.4
	TOTAL	N= 423 (100%)	N= 305 (100%)	N= 442 (100%)	N= 466 (100%)	N= 525 (100%)
III Offences injurious to the public in general.	Death	-	-	-	-	-
	Imprisonment	3.3	2.0	4.0	3.1	2.3
	Caning	0.6	0.4	1.3	6.2	0.2
	Fine	95.1	96.6	93.4	90.0	97.5
	Other	1.0	1.0	1.3	0.7	-
	TOTAL	N= 29859 (100%)	N= 22756 (100%)	N= 19422 (100%)	N= 15559 (100%)	N= 15106(100%)
IV Offences against the person.	Death	0.3	0.2	0.4	0.1	0.1
	Imprisonment	42.2	44.1	33.9	62.6	46.7
	Caning	5.8	5.6	8.2	10.2	11.4
	Fine	46.3	44.4	52.2	22.3	38.4
	Other	5.4	5.7	5.3	4.8	3.4
	TOTAL	N= 6246 (100%)	N= 6288 (100%)	N= 6374 (100%)	N= 5508 (100%)	N= 5547 (100%)
V Offences related to property.	Death	0.01	0.04	0.02	-	-
	Imprisonment	76.2	84.5	76.9	76.0	84.0
	Caning	10.4	6.6	11.3	8.7	8.9
	Fine	5.8	4.0	6.3	9.6	3.8
	Other	7.6	5.0	5.5	5.7	3.3
	TOTAL	N= 10971 (100%)	N= 16591(100.14%)	N= 12666(100.2%)	N= 13131 (100%)	N= 10720(100%)
VI Malicious injury to property.	Death	-	-	-	-	-
	Imprisonment	47.9	61.2	48.3	56.2	65.8
	Caning	5.5	6.0	4.8	4.7	7.2
	Fine	41.7	25.8	44.1	35.8	19.6
	Other	4.9	7.0	2.8	3.3	7.4
	TOTAL	N= 532 (100%)	N= 564 (100%)	N= 818 (100%)	N= 706 (100%)	N= 698 (100%)
VII Forgery, coining & impersona- tion.	Death	-	-	-	-	-
	Imprisonment	84.7	74.3	90.5	92.0	91.4
	Caning	2.8	2.1	-	0.04	1.3
	Fine	8.0	18.5	4.0	6.0	4.6
	Other	4.5	5.1	5.5	1.7	2.7
	TOTAL	N= 249 (100%)	N= 234 (100%)	N= 304 (100%)	N= 235 (100%)	N= 698 (100%)

SOURCE: ADAPTED FROM ZAMBIA POLICE ANNUAL REPORTS

TABLE 43

**SENTENCES PASSED ON PERSONS CONVICTED OF PENAL CODE
OFFENCES IN LUSAKA: 1984-1988 (IN PERCENTAGES) - ALL COURTS**

OFFENCE	SENTENCE	1984	1985	1986	1987	1988
I Offences against public order.	Death	-	-	-	-	-
	Imprisonment	8.6	28.9	27.8	5.6	1.2
	Caning	1.0	-	-	-	0.8
	Fine	88.0	71.1	72.2	93.8	98.0
	Other	2.4	-	-	0.6	-
	TOTAL	N= 2424 (100%)	N= 2166 (100%)	N= 1296 (100%)	N= 162 (100%)	N= 249 (100%)
II Offences against lawful authority.	Death	-	-	-	-	-
	Imprisonment	85.4	68.0	45.3	39.4	84.4
	Caning	14.6	16.0	48.0	43.9	6.2
	Fine	-	16.0	5.3	15.1	9.4
	Other	-	-	1.4	1.6	-
	TOTAL	N= 48 (100%)	N= 25 (100%)	N= 75 (100%)	N= 66 (100%)	N= 32 (100%)
III Offences injurious to the public in general.	Death	-	-	-	-	-
	Imprisonment	11.4	20.0	9.7	32.2	4.0
	Caning	1.1	0.03	5.4	8.5	-
	Fine	87.2	80.0	84.5	57.6	96.0
	Other	0.3	-	0.4	1.7	-
	TOTAL	N= 367 (100%)	N= 3814(100.03%)	N= 3264 (100%)	N= 59 (100%)	N= 427 (100%)
IV Offences against the person.	Death	-	-	-	-	-
	Imprisonment	28.0	66.3	13.8	49.1	44.1
	Caning	2.7	1.0	0.7	2.7	3.8
	Fine	68.8	32.7	85.2	47.4	52.1
	Other	0.5	-	0.3	0.8	-
	TOTAL	N= 2389 (100%)	N= 1189 (100%)	N= 1194 (100%)	N= 998 (100%)	N= 601 (100%)
V Offences related to property.	Death	-	-	-	-	-
	Imprisonment	62.5	80.1	67.9	71.6	88.0
	Caning	22.5	6.6	16.2	5.5	6.6
	Fine	14.2	13.1	15.3	21.4	4.9
	Other	0.8	0.2	0.6	1.5	0.5
	TOTAL	N= 2301 (100%)	N= 1859 (100%)	N= 2622 (100%)	N= 3021 (100%)	N= 1388(100%)
VI Malicious injury to property.	Death	-	-	-	-	-
	Imprisonment	22.4	85.0	26.7	35.7	33.3
	Caning	-	0.8	-	0.7	23.8
	Fine	75.7	14.2	73.0	63.6	42.9
	Other	1.9	-	0.3	-	-
	TOTAL	N= 107 (100%)	N= 120 (100%)	N= 334 (100%)	N= 154 (100%)	N= 631 (100%)
VII Forgery Coining & impersona- tion etc.	Death	-	-	-	-	-
	Imprisonment	76.0	79.0	93.0	93.0	100.0
	Caning	-	-	-	5.3	-
	Fine	21.3	13.1	6.4	1.7	-
	Other	2.7	7.9	0.6	-	-
	TOTAL	N= 75 (100%)	N= 38 (100%)	N= 157 (100%)	N= 57 (100%)	N= 12 (100%)

SOURCE: ADAPTED FROM ZAMBIA POLICE ANNUAL REPORTS

TABLE 44

REASON FOR SENTENCE AGAINST THE TYPE OF SENTENCE IMPOSED (Case Records).

		Reason For Sentence.										
		0		1		2		3		4		ALL
		-----		-----		-----		-----		-----		-----
S	1	251	96.5%	56		39	68.4%	7	100.0%	1		354
e	2	65	3.5%	2		7	12.2%	0		0		74
n	3	13		0		0		0		0		13
t	4	16		0		1	1.8%	0		0		17
e	5	55		0		10	17.5%	0		0		65
n	6	11		0		0		0		0		11
c	7	1		0		0		0		0		1
e	8	3		0		0		0		0		3
ALL		77.3%	415	47.2%	58	46.3%	57	5.7%	7	0.8%	1	538

Key.

Sentence

Imprisonment.....	1
Suspended Sentence.....	2
Probation.....	3
One Day's Imprisonment Plus a Fine.....	4
Caning.....	5
Discharge.....	6
Fine.....	7
Extra Mural Penal Employment.....	8

Reason For Sentence

Not Stated.....	0
Deterrence.....	1
Prevalence and seriousness of the offence.	2
Breach of Trust.....	3
Reformation.....	4

CHAPTER 9

CONCLUSIONS AND RECOMMENDATIONS FOR REFORM.

This thesis has examined the criminal process in Lusaka, i.e. the way the police, the courts and to a lesser extent the prisons deal with the problem of property crime. It has been shown that the organization of the police force, the court procedures and remedies and the way offenders are treated in the Lusaka Central Prison, are a carry over from the colonial past. Signs of inherent conflict between the way the above institutions handle the problem of property crime and the way the traditional system dealt with the same problem have been identified. The thesis concludes that the above institutions have alienated some consumers of criminal justice, many of whom have turned to alternative means to deal with the problem under investigation. Some of the alternative means are based on customary methods of dispute settlement, while others are of recent innovation.

On the other hand, it has been shown that there is a lack of a coordinated approach by the organs of criminal justice named above, to the challenges posed by the problem of property crime in Lusaka. At the crucial points in the criminal process, i.e., at the stages of arrest, prosecution, sentencing and crime prevention, separate wings within the same organs or the organs themselves pull in different directions, even though the problem of the lack of resources is acknowledged and is a serious one. There is also a general lack of appreciation of each other's problems and limitations.

Both the alienation of consumers from the system and the

uncoordinated approach to the problem of property crime are highlighted below and suggestions for reform are made. Inevitably, most of the suggestions for reform are general and far-reaching. In other words, they go beyond the problems posed by property crime in Lusaka.

9:1 The Police

Under Zambian law, the police have a statutory function to prevent and detect crime as well as to apprehend offenders.¹ Conventional wisdom is that the police initiate the process of investigation of crime leading to the apprehension of suspects. This study did not find any strong evidence of that. Instead, it was found that the police depend a great deal on the consumers of criminal justice, namely, witnesses and victims for information leading to the arrest of suspects. The main role of the police is to "locate and apprehend the suspect"² already named or otherwise identified by a member of the public.

Similarly, the role of the police in crime prevention is minimal. They have not devised any viable crime prevention strategy. The lack of official action in this regard has led to the consumers of criminal justice taking their own steps to control crime. These steps have been in the form of vigilantes, the neighbourhood watch scheme and instant justice mobs, though the latter is an after the event control mechanism which does not prevent crime, except perhaps recidivism.

The role of the police in shaping events leading to the arrest of suspects has been the subject of numerous research endeavours

in both the United Kingdom and the United States. In the United States, Black has argued that one reason for the reactive role of the police in the criminal process is that the majority of cases pass through what he calls a "moral filter" by the public before being passed on to the police for official action. In other words, many cases are simply not reported because members of the public do not think that those cases are matters for the police.

Another explanation is that most of the time police work in both countries is taken up in what is termed "social work" functions- matters related to "family disputes" or "noisy parties". Thus, a study by Punch and Naylor revealed that 59% of police calls from the public were "service calls", involving domestic disturbances, nuisances, illness and missing persons and only 41% were "law enforcement calls", involving all forms of crime.

The extent to which both the moral filter and the social work aspect of police functions could be attributed to the inactive role played by the police in Lusaka in the detection and apprehension of suspects as well as in the prevention of crime is not clear. What is clear, however, is that research evidence shows that as many as 82% of victims of property crime, both in Lusaka and in the whole country, do report offences to the police. The extent to which the police in Lusaka or nation-wide act as social workers is equally unclear. What is certain is that for personal and family problems, many people would call an extended family member, a neighbour or a friend, rather than the police.

The main reason why the police in this study were found to have played an inactive role in the major events of the criminal process must be found in the nature of the police force itself. It has been shown that the recruitment criteria, the training and accommodation of policemen and officers still reflects the colonial policy of producing a physically strong policeman, ready to be mobilised in the shortest possible time, particularly for riot control and other civil disturbances (chapter 2). The police force is inadequately trained to perform other statutory functions, i.e, the detection, prevention and prosecution of crime. There is no evidence that the police force, which was established for military purposes, ever enjoyed any popular acceptance and nothing significant has been done to improve the police-public relations. Today police-public relations are still characterised by mutual suspicion and mistrust.

On the other hand, there is a notable lack of resources, even basic ones such as transport. This means that investigations cannot be properly conducted and police have come to rely heavily on the suspects for information leading to the recovery of stolen property or to the whereabouts of accomplices. Where such information is not willingly given, the suspect usually ends up being assaulted and tortured. Assault and torture of suspects in police stations is institutionalised, i.e, it is widespread and is part of police practice. "Confessions" have become the substitute for investigations. Prosecution functions have also been adversely affected by the same problem. Summonses cannot be served on witnesses and their failure to appear results in

the withdrawal of cases in which they are involved. The police failure to provide transport to suspects held at the Remand or Central Prisons and at various police stations to the two court sites in Lusaka is one of the major problems facing the criminal justice system. It is a constitutional right for the defendant to be present at his trial, unless he expressly waives that right.⁷ The first and second failure of the suspect to appear due to lack of transport usually ends in the adjournment of the case to a later date. Subsequent failures to appear for the same reason are not regarded as genuine by the courts and the cases in which the defendants concerned are involved end up being withdrawn at the instance of the police.

The Zambian police force has been alienated from the people that it is supposed to serve. It is both the continuation of the policies of the colonial power and the lack of resources and its consequences that have led to the alienation and to the consequent crisis of confidence in the ability of the police to perform their functions. The police force is therefore, in urgent need of a major reform.

9:1 (a) Police Training, Supervision and Accountability.

In any society the police force is an instrument of power and its methods of dealing with the public reflects the quality of the relationship between the government and the people. As seen in chapter 2, the Northern Rhodesia Police Force, the forerunner of the Zambia Police Force, did not emerge as a "civil" force to perform civil duties. Rather, it was raised as a military force whose first task was to suppress the slave trade and to create

conditions for legitimate commerce in Northern Rhodesia but⁸
without seeking the opinion of Africans on the matter. The
prevention, detection and prosecution of (ordinary) crime was a⁹
secondary role. Reform must therefore address the following
questions: recruitment, training and accountability.

(i) Recruitment.

The qualifications for recruitment as a trainee constable seen in chapter 2 are too narrow in the sense that they place undue emphasis on "physical" qualifications in terms of height and chest measurements. It is suggested here that other than these qualifications, recruits should be subjected to psychological tests to assess their motivation and tolerance levels, interests, temperament and their ability to operate under and to cope with pressure. The Department of Psychology at the University of Zambia could be of great assistance here.

Recruitment to the rank of constable is restricted to people of the ages of between 18 and 25 years, the majority of whom are school leavers. This recruitment policy disqualifies otherwise suitable individuals above the age limit who could bring their own experience in life and the much needed leadership to the police force. As was seen in chapter 4, it was the young and inexperienced police officers who were more inclined to assault and torture defendants in custody. It is proposed that the upward age limit be extended to 35 years.

(ii) Training.

Little has been done to make the Zambia Police cast aside its

military outlook. Training as seen in chapter 2 puts more emphasis on the military drill. There is need to broaden the training of police officers by introducing such courses as the social and political structure of Zambia, the exercise of police discretion and decision making in law enforcement, human rights and the constitution and the role of the force both under the colonial power and under the independent government. In addition, the Police Training School should drop its obsession with "security" and utilise manpower that exists outside the police force. For instance, University of Zambia staff from the School of Law and from the Department of Sociology could handle the suggested courses on a part-time basis or as guest lecturers. This new approach in training could re-orient the police force and help change both its perception and its role in society.

(iii) Accountability.

Since independence, no serious decisions have been taken in the area of police accountability. On the contrary, the post-¹⁰ independence era has witnessed the "politicisation" of the police force. Thus between 1976 and 1988, the Inspector-General of Police was also a Minister of State for Home Affairs. Between 1988 and 1991, he was a member of the powerful Central Committee of the party, the policy-making body chaired by the President and to which both the Cabinet and Parliament were subordinated. In addition, all police officers were required to be card-carrying members of the ruling party and their promotion was based more on loyalty to the party rather than on competency. One consequence of that arrangement was that the Police Force

felt responsible and accountable not to the communities they served but to the distant political authority.

It may be said therefore that like the Northern Rhodesia Police Force, the Zambia Police Force between 1964 and 1991 was used first and foremost as an executor and implementer of government policy and not as a public institution serving the interest of the people. That arrangement had serious implications for the legitimacy of the Police Force.

The Zambia Police Force must cast aside its "political" outlook and transform itself into a truly public institution accountable to the local communities it serves in the post-1991 democratic phase that the country has now entered. Unfortunately, the Zambia Police Act is silent on the question of police accountability.

In England and Wales, the mechanism for police accountability in the form of police authorities for police forces other than the Metropolitan Police,¹¹ is specified in the Police Act, 1964. The main functions of the police authority, whose 2/3 of membership is consisted of elected concillors and 1/3 is magistrates, is to "secure the maintenance of an adequate and efficient police force for the area". For this purpose, the police authority appoints the Chief Constable, the Deputy Chief Constable and the Assistant Chief Constable, subject to the approval of the Home Secretary. It also has the power to determine the size of the establishment the police force, to provide buildings, clothing and equipment.¹² It has been said that the police authority's control of the half of the budget (the other 50% comes from the Home

Secretary), potentially gives it a lot of influence on the distribution of resources, policing methods and priorities.¹³ On the other hand, it has been pointed out that many police authorities do not use most of their powers and instead, look¹⁴ to the professional judgment of the Chief Constable. It should, however, be mentioned that in England and Wales there is a workable relationship between the police and representatives of the local communities. This ensures that public confidence in the police is maintained, and that the police are brought under the control of local people.

It is suggested here that Police Authorities in all the jurisdictional areas of Police Stations in Lusaka be established. The Police Authorities should be composed of people from a cross section of the community: church leaders, civic leaders, teachers, businessmen, workers and police officers themselves. Magistrates should not sit on the Police Authorities as that could compromise their position as adjudicators. Members of Police Authorities could either be appointed by civic leaders or be elected by the local people.

One of the major tasks of the Police Authority should be to tackle the problem of police resources. Experience shows that reliance on Central Government for resources cannot guarantee their permanent source. Local Authorities working hand in hand with the Police Authorities could be the most viable source of the much needed funds. The two bodies could, for instance, introduce a form of local tax on business houses and individuals, calculated on the basis of the ability to pay. This arrangement

could also boost police accountability to the local communities. At the moment Local Authorities get revenue from general taxation.

Other duties of the Police Authority could include the approval of the appointment of the officers-in-charge and other senior officers. It should also recommend its own local people and send them to the Police Training School. In other words, police officers should be made to serve in the communities in which they have roots and in which they know the local population and its social problems and characteristics. The policy of the colonial power which required police officers to serve in areas which they did not come from, as seen in chapter 2 (and which to a certain extent has survived independence), should now be discarded. That policy contributes to tension and friction between the police and the local population.

9:1 (b) Police-Public Relations.

(i) Citizen Complaint Board.

As is the case with regard to the question of accountability, the Zambia Police Act is silent on the issue of complaints against the police. Consequently, there is no system through which allegation of improper conduct of the police towards members of the public can be channelled and investigated.

In England and Wales, the Police Complaints Authority handles all complaints against police officers of the rank of superintendent and below. The Police Complaints Authority is headed by a chairman, appointed by the Queen and 8 members,

appointed by the Home Secretary. Complaints and disciplinary matters involving officers of and above the rank of chief superintendent are handled by the police authority.¹⁶

In both Lusaka and Zambia, it is suggested here that the Police Authority should also act as a citizen complaint board to receive and investigate public complaints against police officers. As an additional measure, officers-in-charge at each police station must be given powers to exercise disciplinary control over officers in minor cases. At the moment, all matters of internal discipline are handled at the Police Force Headquarters in Lusaka by the Inspector General of Police. The delays that this procedure causes has brought about a break-down internal discipline and in the supervision of junior officers¹⁷ by their superiors. An appeal should lie to the Police Authority from the decisions of the officers-in-charge, which should have the power to recommend disciplinary action including the dismissal of police officers.

In order to harmonise fully police-public relations, it is suggested that police camps, which (as seen in chapter 2) have survived independence, should be dismantled and police officers and their families should be allowed to live in ordinary neighbourhoods. Police camps cannot be justified, even on the ground that they shield the police from corrupting influences. Such influences may be found everywhere and they are unlikely to be confined to the neighbourhoods of the police officers' residence alone. Police camps only reinforce the military orientation of the police and promotes the "them" and "us"

feelings between the police and the public.

(iii) Police-Suspect Encounter: The Role of the Media and Human Rights Groups.

At the moment, some members of the public believe that the police are entitled to slap, kick or verbally abuse a suspect once he is under their custody. They feel that it is a normal part of police work to verbally or physically abuse suspects. Many of the offenders who were assaulted in this study said that they expected that form of treatment from the police. Thus remarks such as "they (the police) were just doing their duty" or "it was my fault" or "I deserved it" were made by a number of offenders in this study in response to the question as what they felt about police assault and excesses during interrogation. Other offenders put the blame for police excesses towards them on those who reported the offence to the police or on those who implicated them in the offence.

This attitude only encourages police excesses towards suspects and it should be reversed. This may be achieved by a public campaign by the mass media and human rights groups in which the public must be told that the police have no right to assault non-violent suspects and that suspects who fall victim of police assault must report such incidents to the Police Authority in their area. This campaign must also inform the public of their rights in the event of an arrest and throughout the period of interrogation. In other words, the public should know that the police have a duty to inform them of the reason for arrest (if it is not obvious) and that interrogation is governed by Judges'

Rules. Judges Rules themselves must be tightened up in view of widespread non-compliance to them by the police (chapter 4). They should either be transformed into enforceable legal rules or be replaced entirely by a code as is the case in England (chapter 4). On the other hand, the public should be told that they have a social obligation to assist the police as much as possible in their investigation of crime and prosecution of offenders.

9:1 (c) Coordination of Arrest and Prosecution Duties.

After all these changes have been implemented, the next step should be to re-consider how the police duties of arrest and prosecution could be coordinated both within the police force and with the Prisons Department.

(i) Arrest.

It was seen in chapter 4 that the vigilantes enjoy the power of arrest, but that power is subordinated to the ultimate power of the police to formally arrest. In other words, the vigilantes only enjoy a "temporary power" of arrest as they are expected to hand over the suspect to the police without delay.

The police and the vigilantes, however, have a poor working relationship brought about by mutual suspicion and mistrust. The police accuse vigilantes of being unprofessional, who in turn accuse the police of being "soft" with "criminals". They also accuse the police of lacking "legitimacy", being the creation of a former colonial power without any consultation with Africans. The unpopular image of the police during the colonial period has contributed to the deterioration of their relations with

vigilantes.

The vigilantes have now decided to pursue their own brand of law enforcement in which they deal with suspects instantly without handing them over to the police as the law requires them to do, much to the displeasure of the police. As will be shown later in this chapter, the position of the vigilante scheme in the criminal process is now under threat following the change of government in November, 1991. The view of the present writer is that the vigilante scheme serves little purpose and should be disbanded.

(ii) Prosecution.

The prosecution branch in the police force is consisted of investigators, who are the arresting officers, as well as prosecutors. Ideally, the two wings should coordinate their activities as one cannot do without the other. The arresting officer is in charge of exhibits and is expected to come to court and give evidence for the prosecution. In some cases there has been failure by him either to produce exhibits or to come to court without explanation, resulting in the withdrawal of cases (chapter 5). Similarly, he is expected to investigate the background of all convicted offenders in order to ascertain whether they are first offenders or not. In nearly all cases, there is no such investigation and the prosecutor is forced to admit it. The courts end up treating all offenders as first offenders (chapters 6 and 7). Better training and professionalism as seen above and better storage of information, using computers would improve the working relationship between

these two wings of the police force.

Another problem adversely affecting the prosecution is the transportation of inmates from the Remand Prison to the two court sites in Lusaka. As already seen (chapter 5), it is the responsibility of the police to ferry the remanded inmates to courts, but it is the responsibility of the Prisons Department to ferry the convicted inmates who have other charges still pending against them. While the Prisons Department have never failed to discharge this responsibility, the same cannot be said of the police force. Their failure to ferry inmates results in the withdrawal of many cases in court (chapter 5).

Even though the problem of transport within the police force is well-known and that both the police and the prisons come under the same ministry (Home Affairs), there is no effort to coordinate their transport resources. It is suggested here that the responsibility to ferry inmates of all descriptions should be placed in the hands of the Prisons Department. This is the practice in other countries, for instance Kenya.

9:1 (d) Crime Prevention.

(i) Crime Prevention Units and Neighbourhood Watch Scheme.

The statutory duty of the police to control crime can only be fulfilled once the suggestions made above have been implemented. In order to strengthen their role in crime prevention even further, the idea of the formation of crime prevention units at each police station should be considered. The crime prevention unit, which should be headed by a senior police officer of or

above the rank of Inspector, should coordinate all crime prevention activities. The unit should encourage the formation of neighbourhood watch schemes in all residential areas, particularly in poor communities where the vigilantes and instant justice mobs are active. Eventually, the Zambia Police Amendment Act, No. 23 (1985), which established the vigilante scheme, should be repealed and the vigilante scheme disbanded altogether. Besides, the return of the country to a multi-party system of government and the subsequent defeat of the government that introduced it in October, 1991, has put the vigilante scheme in disarray because the scheme was supervised by the then ruling party (chapter 8). Instant justice mobs would also eventually disappear as neighbourhood watch schemes take hold in all residential areas around Lusaka. It was seen in chapter 8 that the neighbourhood watch scheme is more viable as a crime prevention strategy, than either the vigilante scheme or the instant justice mobs. In addition, the police are already involved in the formation and operation of neighbourhood watch schemes in the three areas in Lusaka where they exist.

(ii) Social Services Sector: The Role of the Small Industries Development Organization (SIDO).

Unemployment and dropping out of school have been identified as the factors strongly associated with the likelihood to commit property crime in Lusaka and they cannot be ignored in crime prevention. Besides, property crime is mostly committed by the youth (chapter 3). As such, this form of criminality cannot be seen in isolation, but in the context of a wider social problem facing the youth of Zambia today. There is need therefore for

organizations, governmental and non-governmental, which deal with the problems of the youth to coordinate their activities with the activities of the police in the prevention of crime. Efforts should be made by the suggested crime prevention unit in conjunction with the social services sectors such the Small Industries Development Organization (SIDO) to identify the most vulnerable youths (i.e those most likely to drift into crime). That could be done by careful analysis of the available data on the characteristics of offenders as discussed in chapter 3. The most vulnerable youths, as already mentioned, are most likely to be the unemployed school drop-outs. Once that has been done, the identified youths should be encouraged to join various skills' training programmes run by organizations such as SIDO and eventually be assisted to settle in self-employment. At the moment, the activities of these organizations are not linked to crime prevention and this trend should be reversed.

9:2 Magistrates' Courts..

This thesis has shown that under customary law, victims participated fully in the resolution of disputes as parties and not merely as witnesses. Under that system the remedies were compensatory and satisfied the needs of victims of crime. Customary procedures and remedies were replaced by the common law rules of procedure which treated victims of crime, not as parties to the dispute, but as witnesses for the prosecution. The parties became the state and the defendant. Similarly, compensation of victims was replaced by punishment of offenders, usually by imprisonment or caning. These changes, though

welcomed initially by Africans, were later resented. Africans stopped taking their cases to the courts or fled when called as witnesses (chapter 2).

Evidence in this study shows that some consumers of criminal justice, particularly those whose personal matters such as marriage and divorce are regulated by customary law, have not²¹ fully accepted the received procedures and some remedies. The continued rejection of these aspects of the received criminal justice system is manifested in the withdrawal of cases by some complainants from the magistrates' courts in favour of alternative justice. Other complainants and witnesses expressed their rejection by not turning up at the court to give evidence. Like the Zambian Police Force, the magistrates' courts have alienated the people they were meant to serve. Both their procedures and the remedies need re-examination.

9:2 (a) The Trial Process.

(i) Evidence.

As already seen above, customary law is not a source of the law of evidence in criminal matters. The main source of law of²² evidence in Zambia is common law. It is therefore embodied in technical rules which some consumers of criminal justice find incomprehensible. For instance, a case in the magistrates' court may collapse because of an error in pleading or because a certain²³ kind of evidence is admitted. The rule against the admission of hearsay evidence is intended to ensure that only "relevant" evidence is presented to the court. On the other hand, procedural matters were not so crucial to the success of a

case under customary law. Much more emphasis was placed on substantive matters rather than procedural matters. Customary courts were not restricted to the consideration only of those issues raised in the case at hand, but consideration was accorded to other related issues such as the history of the case and the relationship between parties, if any. Thus, even hearsay evidence was admissible and it was for the court to assess what weight was to be attached to that evidence. The practice in magistrates' courts today, therefore, leaves the root causes of disputes unresolved because of the "narrow" approach to dispute settlement. A Lusaka Local Courts Adviser has pointed out that:

"The aim and objectives of African litigation before native tribunal are to inquire into the causes of the conflict or matter, find a remedy and cause the guilty party to compensate the injured party".²⁵

Similarly, Professor Allott has observed that:

"A confrontation in detail of African and English ideas about evidence shows the advantage to lie in many respects with the African system. One healthy consequence of the desire to Africanise the legal system might be to devise an altogether different approach to the law of evidence, which, from the English side, is bogged down in technicalities dating back to the exigencies of a quite different, and now vanished, system of trial".²⁶

Magistrates' strict adherence to common law rules of evidence should be re-examined. Rules to allow them to admit all evidence (except previous convictions and evidence of character), direct or hearsay should be introduced. This would broaden the factual basis upon which the decision could be reached as it would enable magistrates to examine disputes in a much wider social

context than they do at present. This approach would also give²⁷ meaning to the constitutional right to a fair trial.

(ii) Procedures.

The procedures must also be re-examined. Firstly, the victims of crime must be accorded an opportunity to address the court as to the impact of the crime in question and as to the possible means of disposal, in the same way that a defendant is allowed to make a statement in mitigation of sentence. This mechanism is embodied in the customary fashion of dispute settlement and would enhance the public participation in the trials. In addition, courts should consider the use of section 197 of the Criminal Procedure Code, which empowers them to sit with assessors, but which in practice is never used. Secondly, the question of the language of the court must be addressed. There is no clear language policy in Zambia, partly due the controversial nature of the subject. The country is said to have 73 languages, though in reality, there are only 5 main languages, the rest being only dialects of those 5. Steps must be taken, however, to introduce, not one indigenous language for the courts nation-wide, but regional languages. In Lusaka, for instance, Nyanja, the language spoken by 77% of defendants in this study should be introduced as the language of the courts there. The use of the English language in courts should continue for records purposes and should be available to any defendant who wishes to use it. In Kenya, court proceedings are in both English and Swahili. In Tanzania, the language of the the primary courts, the equivalent of magistrates' courts in Zambia,²⁸ is Swahili.

9:2 (b) Sentencing.

(i) The Current Practice: A Reappraisal.

Closely related to the matters of procedure is the question of remedies available in the magistrates' courts. At the present moment, there is no coherent sentencing policy in Zambia, although the existing rules and practice favour imprisonment of offenders. What exists is a confusing set of objectives pursued by different components of the criminal justice system. Magistrates' courts in Lusaka pursue a deterrent policy as evidenced by their sentencing remarks in the cases where they are made, so does the legislature as evidenced by minimum and long sentences they have provided for property offences. As for the government itself, the position is not clear. Presidential speeches of the last 27 years implied rehabilitation of offenders as the aim of punishment under the official ideology of humanism.

But it was not certain whether presidential speeches were policy statements or simply statements of intent. What is clear, however, is that neither deterrence nor rehabilitation "policy" has succeeded in preventing crime, in reducing recidivism, or in satisfying the victims of crime.

(ii) A New Sentencing Policy.

The withdrawal of cases by complainants on the ground that an arrangement has been made with the defendant for compensation or restitution of property (or in what ever form that reason is disguised), must be seen in the light of the narrow approach to dispute settlement and the nature of remedies available in the magistrates' courts. There is need for a sentencing policy which

may remove the incentive to withdraw cases on the ground of the lack of compensation alone as well as on the ground that the complainant does not want the defendant to go to prison.

The new sentencing policy must be based on the traditional system of compensation, adapted to suit the realities of today's living conditions. The question is what sort of punishment can embody both the traditional theory of punishment and the realities of modern living conditions on the one hand and be deterrent enough on the other?.

It was seen in chapter 2 that prisons did not exist in the territories later named Northern Rhodesia (now Zambia) before they were introduced by the colonial power. Today as already seen in chapters 6 and 7, imprisonment is the most widely imposed punishment on property offenders in magistrates' courts in Lusaka. This trend cannot be allowed to continue. What makes imprisonment inappropriate is not necessarily because it is un-African. Rather, it is because there is no strong evidence that it prevents crime more than other forms of disposal. Although it may be improper for penal policy to be influenced solely by economic considerations, it may be said nevertheless, that in a poor country such as Zambia, the current excessive use of the prison sentence is a drain on national resources and cannot be justified when there are other pressing claims on the public budget, such as education, health and others. Besides, imprisonment dehumanises and degrades people. In Lusaka Central Prison, for instance, prisoners sleep on a bare concrete floor. Sanitation and catering facilities are very poor. However, even

though imprisonment did not exist in the traditional society, there is no denying the fact that traditional Zambian society sometimes treated offenders severely by such means as amputation of limbs as was seen in chapter 2. But those severe penalties were exceptional. Hence Ndulo has pointed out that:

"The traditional Zambian society was an accepting community and the high valuation of man and respect for humanity which are a legacy of our traditional society should not be lost in the Zambian penal system".³¹.

A survey conducted by Clifford in 1963 involving 130 respondents revealed the prevalence of a punitive attitude towards offenders among the respondents. The majority of them expressed the view that offenders should be given heavy sentences accompanied by
32
harsh treatment in prison.

A more recent study, however, seems to suggest that the notion of severe treatment of offenders no longer has a popular appeal. The victimization survey already referred to in chapters 1, and 8 found that only 10% of the respondents felt that longer prison
33
sentences were the solution to the property crime problem. This means that a policy shift away from heavy reliance on imprisonment as punishment for property offenders would not be met with strong public disapproval.

The initial effort at the formulation of a flexible sentencing policy should begin with the repeal of section 26(3) of the Penal Code. That section according to judicial interpretation (as seen in chapter 7) makes the order a fine unaccompanied by imprisonment illegal, in the case of felonies (which all property offences are). The next step should be to make a

serious review of mandatory sentences as they apply currently to theft of a motor-vehicle and to stock theft. There is no justification for their existence. Other than compounding the problem of prison over-crowding, these sentences have not had any significant impact on the rate of offences in question (chapter 8). Further, they enhance the rigidity of the sentencing regime and should therefore be removed. Recently, the Supreme Court in Zimbabwe held that the minimum sentence under the Precious Stones Trade Act, 1978 was not unconstitutional (i.e it was not inhuman and degrading punishment), but held further that³⁴ this form of sentence should be re-examined.

The next step should be the examination of the existing range of non-custodial measures in order to see which ones are the most viable and which could satisfy the interests of the victims as well as ensure that individual characteristics of each offender are taken into account. The existing range of non-custodial orders seems adequate and introducing new ones could be superfluous (chapter 2). Any new approach therefore should be within the existing structure.

It seems that there are four serious alternatives to imprisonment. These are: probation, fines, compensation and Extra Mural Penal Employment (E.M.P.E.).

A significant swing in favour of probation would require massive investment in terms of both personnel and facilities. The economy at the moment is too weak to undertake the kind of investment needed for a viable probation service. There are no voluntary

organizations which could assist government efforts. Families in both the urban and rural areas in Zambia are too scattered to be a viable alternative. As experience with the vigilante scheme has shown (chapter 8), there is no substitute for professionalism in the criminal justice system. In any case, probation, if used widely, would not satisfy the victims who would like the offender to "pay" in one form or another for his offence.

Fines cannot generally be a viable alternative to imprisonment, even though they may be a source of much needed revenue for the government. The substantial number of property offenders as seen in chapter 3 are unemployed or marginally employed and poor. Many of those who were employed at the time of the offence were in the lowest income bracket. Many of them could therefore end up in prison for failure to pay fines. Kercher's observation on the possible consequences of the wide use of the fine in Kenya is equally true of Zambia. He says:

"In a society of poverty where most people live from hand to mouth, it obviously has limited applicability and if unwisely imposed can wreak severe hardship on some families and on some communal groups as well".³⁵.

Given the general background characteristics of offenders as found in this study, fines would have to be extremely low in order to be afforded by many of them. But that would make their enforcement uneconomical and their deterrent value insignificant. Besides, there is no system of payment of fines in instalments. Magistrates in Lusaka are not in favour of offenders being allowed to pay fines in instalments, citing the problem of enforcement as the major reason for their objections.

Yet another problem with fines is that they present unique difficulties in the formulation of a fair sentencing regime in a country of deepening inequalities such as Zambia. The day fine system as it operates in Sweden would be unsuitable for Zambia. It would be difficult to determine the income levels of offenders because of the instability of the economy as a result of high inflation, currently running at about 135%. It would also be difficult to determine income levels of offenders employed in the informal sector, who in this study comprised 11.6% of the offender sample (Chapter 3 Table 11). Above all, the Swedish model has no formula for assessment of "income levels" of the unemployed offenders (without any form of social security) who constituted 42% of the offender sample in this study. Imposition of fines at the discretion of the courts should, however, remain a possibility especially in cases where they are designed to prevent the offender from enjoying the fruits of his crime.

Compensation presents similar problems. The lack of compensation orders in the magistrates' courts was the major reason for the withdrawal of some cases in this study as already seen (chapter 5). But as a general policy, compensation would result in the imprisonment of those unable to pay. The possibility of offenders paying from future earnings would be unrealistic in view of the wide-spread unemployment and /or low income among offender.

As seen in chapter 2, the cornerstone of compensation was the extended family system and a network of kinship pattern of life. As already mentioned, families are too scattered to provide any

firm basis for compensation. Besides, many people, particularly in urban areas, are increasingly finding it difficult to honour their extended family commitments due to the poor economy and pressures of urban living. Compensation, it seems, cannot be implemented under today's living conditions without a substantial part of public funds being committed for the purpose. The current economic climate makes this the most unlikely option. Even if the economy was healthy the setting up of a compensation fund would be resented by the public. Many people would prefer that public funds be spent on providing the needed social services or improving the falling standards in public services than making amends for the infractions of criminals.

The United Nations' (Criminal Justice Branch) position on the issue of a compensation fund is unclear. Some member countries have spoken in favour of such a fund while others have opposed the idea mainly on the ground that it would strain state resources.³⁷ Compensation, however, should continue to be available at the discretion of the courts and the amount should be unlimited. At present the courts can only award a maximum³⁸ compensation of K50.00 (an equivalent of 25p).

Extra Mural Penal Employment (E.M.P.E.) appears to be the most viable alternative to imprisonment. The background characteristics of the majority of offenders as seen in chapter 3, would make this order particularly suitable for them. The unemployed offenders could be available for work during normal working hours. Offenders in full-time employment could get time off for E.M.P.E. As was seen in chapter 3, most offenders who

were employed at the time of the offence, were really not the most essential workers wherever they were employed. Alternatively, offenders in full time employment could perform E.M.P.E. after normal working hours or during week-ends. For minor offences such as theft, E.M.P.E. order alone could be sufficient. But for serious offences such as burglary, that order could be combined with other orders such as the suspended sentence, conditional discharge or probation. The self supervisory nature of these additional orders could instil further responsibility and self discipline in the offenders. This could ensure that as far as possible, all types of offenders would be dealt with within the communities.

E.M.P.E. is a form of compensation which works independently of the extended family system but which does not necessarily bring personal benefit to the victim of crime. Most victims of property crime would be satisfied to see offenders engaged in publicly beneficial labour such as cleaning schools, hospitals, parks, public offices, roads etc., in the absence of personal compensation.³⁹ Individual satisfaction of the victim of crime, the basis of traditional compensatory settlements, should give way to the satisfaction of wider public interests. In traditional society, as seen in chapter 2, if an offender could not afford compensation, he was required to perform unpaid labour in the victim's garden for a certain period of time. Similarly, an arsonist was required to build a new house or to put up a new roof on the victim's house.

The law allowing the imposition of the E.M.P.E. order should,

however, be amended. As seen in chapter 2, this order only applies to offenders sentenced to a maximum of 3 months imprisonment. On the basis of the results of this study, the E.M.P.E. order potentially covers only 3% of the imprisoned offenders (chapter 7 Tables 33 and 34). It is suggested here that the 3 months's maximum term of imprisonment be extended to say 12⁴⁰ months. On the basis of the findings of this study, E.M.P.E. would then potentially cover 53% of the imprisoned offenders (53% of the imprisoned offenders were sentenced to 12 months imprisonment or less).

9:2 (c) The Position of Imprisonment under a new Sentencing Policy.

The suggested adoption of E.M.P.E. as the basis for a sentencing policy does not mean that there should be no room for imprisonment. Rather, it means that owing to the intolerable prison conditions in both Lusaka and the whole country, the sentence of imprisonment should either be used as a last resort or be reserved for recidivists only. For other offenders, the most appropriate form of prison sentence should be the one served in "open air prisons". Open air prisons are really prison farms and they are therefore economic assets as they contribute significantly to the food requirements of the country. The government policy is for each of the 53 districts nationwide to have at least one of such prisons. At present, there are 32 open air prisons throughout the country. All of them have been established within the last 6-7 years. Lusaka has one such prison situated at Mwembeshi, some 25 km. west of the city.

Mwembeshi Open Air Prison has an office block, a kitchen, a mechanic workshop and several dormitories. Neither the dormitories nor the farm itself is fenced and inmates walk about freely with minimal restriction. The dormitories are surrounded by several sentry houses which are manned by guards, who are all inmates themselves. Inmates are expected to work daily on the farm except on Sundays.

The day to day affairs of the prison, such as matters of discipline, working parties, food preparation and distribution are carried out by prisoners themselves through captains and prefects. Prison officers only come in when complications arise. The prison regime is so relaxed that one would expect⁴¹ escapes to be the major problem but that is not the case.

Admission to Mwembeshi Open Air Prison is restricted to three types of offenders. These are: offenders convicted of minor offences such as assault and those convicted of offences for which they were sentenced to imprisonment for two years and below. In both categories, prisoners must be first offenders. Occasionally, recidivists may also be sent to the open air prison, but that is done only after a careful screening has been⁴² carried out.

At the moment, it is the prison authorities at the Lusaka Central Prison (where all prisoners are initially admitted), who determine which prisoner should be sent to the open air prison. It is suggested that magistrates should determine what form of imprisonment (closed or open) is suitable for a particular

offender in the same way that they determine whether imprisonment is to be "simple" or with "hard labour". In other words, a committal to an open air prison should be one of the range of penalties available for the courts to impose. The main advantage in this approach is the prevention of possible abuse of the process by prison officers.

9:2 (d) Supervision of Magistrates' Courts.

One of the reasons for the excessive use of the prison sentence in this study was the lack of awareness on the part of some magistrates, of the range of available non-custodial sentences, such as E.M.P.E. On the other hand, the award of non-custodial measures such as caning, the suspended sentence, discharge and E.M.P.E indicates that magistrates generally, were not aware of the laid down conditions upon which they should be imposed. In addition, there was a general disregard for the decisions of the appeal courts in matters such as the effect of the plea of guilty on the sentence and the sentencing of joint offenders.

The underlying reason for all these problems is the lack of supervision of magistrates' courts by the High Court as required by the C.P.C. There are two options available by which the supervision of magistrates' courts could be made more effective. The first option could be to reorganise the whole system of support staff at the courts so that the court clerks could have their current status of administrative officers changed to that of professional officers. In other words, court clerks would have to be fully qualified legal practitioners as

is the case in other countries such as England and Wales. They could then assume advisory duties to magistrates on important legal matters. But this approach is not practical as it would require a huge investment in manpower and in other resources. Poor conditions in the public service would make it impossible to retain staff of high calibre, as is the case at the moment.

The second and more realistic option is to reorganise the courts' own existing supervisory structure. The supervisory scheme of magistrates' courts by the High Court is unworkable because the rules regulating it are vague. The supervisory rules do not entrust responsibility to any specific judge or a group of judges but they leave the matter to individual judges to perform that role on their own initiative. Consequently, no individual judge in the High Court feels responsible for the supervision of magistrates. The problem is compounded by the fact that judges are over-worked as they barely cope with their own case loads.

It is suggested that consideration be given to the appointment of a Deputy Registrar of the High court whose duty would be to supervise the operations of magistrates' courts. The main duties of the Deputy Registrar should be the formulation of sentencing guidelines from time to time and pointing out to the magistrates the existing range of non-custodial measures and conditions under which they can be imposed.

A system of "internal" law reporting in which all important decisions of appeal courts could be reproduced and circulated to

all magistrates should be introduced. In addition, the new Deputy Registrar should circulate important judgments passed by other magistrates so that some consistency in approach could be achieved in similar cases. Other measures could include making it mandatory for a magistrate to provide reasons for imposing a custodial sentence. That could bring about rationality in sentencing.

Given that the magistrates' courts are at the center of the criminal process, i.e, they receive, "process" and finally dispose of defendants, the duties of the Deputy Registrar should go beyond the supervision of magistrates. At the moment, the various organs of the criminal process, i.e, the police the magistrates' courts and the prisons show less appreciation of each other's problems and limitations. The courts are not concerned with the over-crowding in prisons as they admittedly do not take into account the availability of accommodation in prisons when sentencing. Similarly, they do not seem to appreciate the problems of resources that the police face. Applications by the police to adjourn cases as they plead for more time either to send summonses or to trace witnesses are usually refused. The police end up withdrawing those cases. As seen above, the Prisons Department shows no willingness to assist the police with transport for inmates.

The fact that the institutions named above hold seminars individually has further isolated them from each other. It is suggested that the Deputy Registrar should organise joint seminars at least once every two years, at which representatives

of the various organs of the criminal process would highlight their particular and common problems and suggest solutions. Expert attendance at the seminars should be sought from criminologists, sociologists, social workers, legal practitioners and other interested parties.

Further, the role of the Law Development Commission in law reform should be strengthened. Since its inception in 1976, the Commission has been plagued with many problems. The practice of appointing retiring senior judges as Directors has not provided effective leadership to the Commission. Even though the Law Development Commission is a statutory body, it has never been accorded an opportunity to operate autonomously. In practice, it is regarded as a department of the Ministry of Legal Affairs. Consequently, it has no budget of its own, and has to depend on the resources provided by the Ministry. These problems need to be addressed if the Law Development Commission has to perform its statutory functions.

All the above suggestions could be implemented in the short term. In the long term, what is needed is a detailed study of both customary law and the received law. The study, which should be on the scale of a British Royal Commission should include substantive law, procedures and penalties provided under the two systems. It would then be possible for both the policy makers and the consumers of criminal justice to discover what good aspects of customary law have been neglected so that they could be included in the new Penal Code and the new Criminal Procedure Code. On the other hand, certain features of the received law,

procedural and substantive, which are the source of alienation of the people from the system, should be identified and excluded from the new Codes. Above all, there should be a serious commitment to research and teaching of customary law at the University of Zambia and the proposed Institute of Criminology.

Notes

- 1 See section 5 of the Zambia Police Act, (Cap 133 of the Laws of Zambia which states: "The Force shall be employed in and throughout Zambia for the preserving the peace, for the prevention of crime, and for the apprehension of offenders...".
- 2 B.Mitchell, "The Role of the Public in Criminal Detection", [1984] Crim.L.R. 459, 466.
- 3 Quoted by Mitchell, ibid, 459.
- 4 See discussion by R.Reiner, op cit, 1984, 112.
- 5 M.Punch and T.Naylor, "The Police: A Social Service?", 1973 New Society, 17th. May 358-361.
- 6 See chapters 4 and 5 of this Thesis.
- 7 Article 18(2) of the Constitution of Zambia.
- 8 Professor Reiner has demonstrated the fierce debate both inside and outside the British Parliament that characterised the creation and acceptance of the police in Britain. See, op cit, 1984, 9-82.
- 9 It has been observed about the Nigerian Police, for instance that its orientation before independence was "containment". Its stance was "military" and it was not meant to serve the community. See F.Odekunle, op cit, 62, 76.
- 10 "Politicisation" of the police in Zambia means the bringing of the police under the direct control of the political authority and the incorporation of the police command into the political decision-making process. It is therefore a wider and more far-reaching form of politicisation than in England. According to Professor Reiner, politicisation of the police takes three forms: the police handling of political issues such as terrorism, political demonstrations and urban riots, which are informed by an explicit political consciousness; political accountability which has become a major political issue partly due to the growing controversy about police work; and the emergence of the police themselves into the political arena as an overt pressure group by law and order campaign. See R.Reiner, "The Politicisation of the Police in Britain", in M.Punch (ed), Control in the Political Organization, Cambridge, U.S.A. 1983, 126-127.
- 11 The Home Secretary acts as the police authority for the Metropolitan Police in London. See A New Police Authority for London, a consultative paper on Democratic Control of the Police in London, G.L.C. Police Committee Discussion Paper No. 1, 1983, 4.
- 12 Section 4 of the Police Act, 1964, (U.K).

13 See S.Spencer, Called to Account, The Case for the Police Accountability in England and Wales, London, 1985, 42.

14 See R.Reiner, op cit, 1984, 193.

15 The independent government has justified the continuation of this practice on the ground that it promotes national unity and integration. The view that if policemen performed their functions in their areas of origin could "undermine" law enforcement might also have been considered.

16 See M. Zander, The Police and Criminal Evidence Act, 1984, London, 1985, 123.

17 Evidence concerning disciplinary matters within the Police Force is not readily available. The Zambia Police Annual Reports carry some information on this matter but it is crude and imprecise. But the 1980 Annual Report carries more specific information. That report shows that a total of 495 police officers nation-wide were disciplined (out of a total of 10,614 police officers) that year. Of the 495 officers, 57% were disciplined for being "absent without leave", 29% were disciplined for "drunkenness", "discreditable conduct", and for "disobedience to orders". Others were disciplined for such offences as being "late for duty", "discharging a fire-arm without authority", "insubordination" etc.

During the same year, a total of 124 police officers were prosecuted nation-wide for various offences including theft by public servants, conduct likely to cause a breach of the peace, careless driving, being drunk and disorderly, affray and other offences. See Zambia Police annual Report, 1980; 4, 5.

18 For instance Sitali, (House breaking) interviewed on 11th. September, 1989; Lupiya, (Theft) interviewed on 11th. August, 1989; Nyambe, (Robbery) interviewed on 21st. August, 1989.

19 For instance, Matipa, (Theft) interviewed on 27th. September, 1989, Kabaso, (Burglary) interviewed on 11th. October, 1989, Mbayama, (Stock Theft) interviewed on 20th. September, 1989 At least two offenders, however, informed the writer that they had taken a civil action against the police for assault and battery. These offenders were Chipanta, (Aggravated Robbery) Interviewed on 15th. September 1989 and Kumba, (Aggravated Robbery) interviewed on 16th. September, 1989.

20 See Clegg et al, op cit.

21 Zambia's socio-economic structure is divided between subsistence and commercial-industrial sectors with their associated cultures and patterns of life. The former, which is the largest sector comprises people whose lives are by and large regulated by customary law and the latter group constitutes the business and professional people whose consumption patterns emulate Western standards. See R.Purdy, op cit, 67, 79 and N.Mijere, "Youth and Development of Self-Reliance in Zambia", in

K.Osei-Hwedie and M.Ndulo (eds), op cit, 1989, 124.

22 J.Hatchard and M.Ndulo, The Law of Evidence in Zambia, Cases and Materials, Lusaka and London, 1991, 1.

23 See A.N.Allott, "Evidence in African Law", in E.Cotran and N.N.Rubin (eds), Readings in African Law, London, 1970, 83.

24 Ibid, 83.

25 M.C.Chilundo, op cit, 119.

26 A.N.Allott, "The Future of African Law", in H.Kuper and L.Kuper (eds), African Law: Adaptation and Development, Los Angeles, 1965, 232.

27 Article 18(2) of the Constitution of Zambia.

28 For Kenya, see Clegg et al, op cit, 3, for Tanzania, see section 12(1) of the Tanganyika Magistrates' Courts Act, 1965 and A.B.Weston, "Law in Swahili- Problems in Developing the National Language", East Africa Law Journal, Vol. 1, 73, (1965).

29 N.Morgan, "Non-Custodial Penal Sanctions in England and Wales: A New Utopia?", The Howard Journal, XXII, 1983, 148, 162.

30 Figures on prison expenditure per inmate are not available. But with the pupulation of inmates being an average of 12,000 annually, a considerable amount of resources are being committed to house and feed prisoners and to ensure the security of prisons.

31 M.Ndulo, op cit, 1977, 34.

32 W.Clifford, op cit, (1963-64), 447.

33 K.T.Mwansa, op cit, 1985, 225. This study has many advantages over the study by Clifford. Unlike Clifford's study, it involved property offences only and its sample was nationwide. But its major flaw was that it covered only the views of the literate subjects who were able to fill in the questionnaire.

34 S. V Arab, 1990, Z.L.R. 253. (Supreme Court).

35 L.C.Kercher, op cit, 71.

36 See H.Thornstedt, "Day Fine System in Sweden", [1974] Crim.L.R. 307. Hatchard supports this system and has argued for its adoption in Zambia. See op cit, 1985, 503.

37 Report on the African Regional Preparatory Meeting for the 7th. United Nations' Congress on the Prevention of Crime and the Treatment of Offenders, held in Addis Ababa, 28th. November-2nd. December, 1983, 1.

38 Section 175(1) of the Criminal Procedure Code.

39 E.M.P.E. is similar to the English community service order imposed by courts under sections 14 and 17 of the Powers of Criminal Courts Act, 1973. It may be imposed on offenders aged 17 years and above and requires the offender to perform specific work in the community for not less than 40 and not more than 240 hours over a period of 12 months. Such work usually involves improving amenities, helping the aged and the disabled, gardening and cleaning hospitals. See D.Banard, The Criminal Court in Action, London, 1978, 181 (foot note no. 17).

40 In Kenya, for instance, E.M.P.E. covers offenders sentenced to a term of 6 months imprisonment. See Kercher, op cit, 84.

41 Mwembeshi Open Air Prison was visied by the writer in February, 1988. Escapes at that prison are foiled by an elaborate intelligence net-work involving inmates themselves. The few who manage to escape are easily caught by inmates who fear the tightening up of rules following a successful escape. The other deterrent is the fact that a prisoner who escapes ends up in a "closed" prison once he is caught. During their free time inmates entertain themselves to a variety of traditional dances and drama. Inmates have an active football side which has joined a local amateur league, where in 1988 they were running second on the league table.

42 Interview with Mr.Banda, Officer-in-charge, Mwembeshi Open Air Prison, on 18th. February, 1988. Qualifications for selection of inmates for the Open Air Prison are broadly similar to those in other countries where similar institutions exist. In Finland, for example, see P.Uusitalo, "Residivism After Release from Closed and Open Penal Institutions", 12 Brit.Jo.Crim, 213, (1972) and for Nigeria, see T.O.Elias, "Traditional Forms of Public Participation in Social Defence", 27 International Review of Criminal Policy, 18, (1966-1970).

43 Sentencing Practice in Magistrates' Courts, Home Office Study No. 56. HMSO, London, 29.

44 See the Law Development Commission and Institute of Legislative Drafting Act, Cap 6 of the Laws of Zambia.

45 The statutory functions of the Commission include conducting research in various branches of law and holding seminars and conferences on legal problems. See section 2 of the Law Development Commission and Institute of Legislative Drafting Act.

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Appendix 1.

Definition of Offences Covered in this Thesis.

1 Theft is defined in sections 265 and 272 of the Penal Code as: "Any person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general owner or special owner thereof anything capable of being stolen, is said to steal that thing". Section 272 of the Penal Code as amended by section 8 of the Penal Code (Amendment) (No.2) Act No.29 of 1974 reads: "Any person who steals anything capable of being stolen is guilty of the felony termed 'theft', and, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, is liable to imprisonment for five years.

2 Stock Theft is defined in section 275 of the Penal Code and as amended by section 3 of the Penal Code (Amendment) (No. 2) Act No. 1 of 1987 as: "If the thing stolen is a bull, cow or ox, or the young of any such animal, the offender is liable to imprisonment for a period--(a) in the case of a first offence, of not less than five and not exceeding fifteen years; (b) in the case of a second or subsequent offence, of not less than seven years and not exceeding fifteen years.

3 Theft by Public Servants is defined in 277 of the Penal Code and as amended by section 9 of the Penal Code (Amendment) (No.2) Act No. 29 of 1974 as: "If the offender is a person employed in the public service and the thing stolen is the property of the Government, a local authority or a corporation, body or board, including an institution of higher learning in which the Government has a majority or controlling interest, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for fifteen years.

4 Theft by Clerks and Servants is defined in section 278 of the Penal Code as: "If the offender is a clerk or servant and the thing stolen is the property of his employer, or came into the possession of the offender on account of employer, he is liable to imprisonment for seven years.

5 Theft of a Motor-vehicle is defined in section 281A(1) of the Penal Code as amended by section 10 of the Penal Code (Amendment) (No. 2) Act No. 29 of 1974 and by section 4 of the Penal Code (Amendment) (No. 2) Act no. 1 of 1987 as: "If the thing stolen is a motor-vehicle, the offender is liable to imprisonment for a period-- (a) in the case of first offence, of not less than five years and not exceeding fifteen years; (b) in the case of a second or a subsequent offence, of not less than seven years and not exceeding fifteen years. Section 281(A)(2) reads: "In this section 'motor-vehicle' means a motor-vehicle or trailer--(a) which is registered or registrable under the provisions of section 26 of the Roads and Road Traffic Act (Cap 766 of the Laws of Zambia) or (b) which is exempt from the need for registration under any of the provisions of the Roads and Road Traffic Act or

any regulation made thereunder.

6 Robbery is defined in section 292 of the Penal Code as: "Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of robbery and is liable on conviction to imprisonment for fourteen years.

7 House Breaking and Burglary are defined in sections 300 and 301 of the Penal Code as: "Any person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, celler flap, or other thing, intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.... is guilty of the felony of 'house breaking' and is liable to imprisonment for seven years. If the offence is committed in the night, it is termed 'burglary' and the offender is liable to imprisonment for ten years.

APPENDIX 2 CASE RECORDS INFORMATION FORM

Year

<u>PARTICULARS OF DEFENDANT</u> Residence, employed, nature of employment or unemployed.	AGE & SEX	DATE OF ARREST & WHETHER RELEASED ON BAIL	DATE OF FIRST APPEARANCE ADJOURNMENTS ETC	CHARGE, SPECIFY SECTION IN PC, QUANTITY OF GOODS ETC	PLEA	JUDGEMENT SENTENCE AND REASONS

Appendix 3 Record of an interview of an Inmate (an abridged version).

Name of Offender: Norman Banda.

Offence: Burglary.

Date of Interview: 9th. October, 1989.

I was born in 1970 in Lusaka, Libala Stage II Compound. I am the last born in a family of 7. I have 3 brothers and 3 sisters. My parents divorced in the early 1970s and both of them re-married.

After the divorce, I went to stay with my mother and my step-father who looked after me well. Later my mother and my step-father left Lusaka to go and live on a farm in Kabwe, some 250km. away. Soon after, my father and my step-mother also left Lusaka and settled on a farm at Shantumbu in Lusaka rural. I stayed behind, keeping up with my cousin to complete my primary school.

I went to school up to Grade 7. I left school in 1985 at the age of 15, because I failed to qualify for Grade 8. I then left Lusaka and went to stay on my father's farm. I stayed there for two years and left in 1987 and went to stay with my aunt in Kabwe. I stayed at my aunt's house for one year and during that year, I learnt how to make Kachasu, an illicit brew which guaranteed me a source of income. I stopped that business because of the shortage of sugar in Kabwe, an important ingredient.

I left Kabwe for Lusaka to stay with my cousin and my brother. Life became hard. I had no job, but I needed money. I made a lot of friends soon after arriving in Lusaka, some of whom I knew before as a child.

In July, 1989, my three friends and I broke into a car around 12 hours and stole some parts: the head lamps, the alternator, the battery, the windscreen and tyres. The vehicle had been parked outside a bar and the owner was inside having a drink. These items were easily sold and the money divided amongst us, Kelvin, the leader getting the biggest share. I used my share mostly on entertainment.

During the same month, we broke into a house in Woodlands Extension around 3 hours and stole a video recorder, a TV set, a stereo system, a pressing iron and K5,000. cash. All these items were in the sitting room. The money was in a drawer of a display cabinet. Two of us, myself and Kelvin went inside the house whilst the other two remained outside watching out for any signs of trouble. We secured entry into the house through the kitchen window. We first removed the pat, then the window pane and squeezed ourselves in through the burglar bars. The house had been selected after a careful survey of the area. We knew before hand where the items we wanted were to be found in the house. We also knew the owners of the house and their movements, but during the burglary, we suspected that they were inside. We were armed with iron bars and knives and were ready for any confrontation as long as guns were not involved. All the

items were sold for K50,000. Being then the leader of the gang I gave myself K20,000 as my share and the rest was shared between my three accomplices.

In August, 1989, we broke into a house in Libala Stage II at around 1 AM. and stole a radio cassette, a dinner set, a pair of shoes, 10 shirts and two pairs of trousers. We knew the owner of the house and we were also aware that at that particular time he was not at home. These items were sold for K5,000. and I got K2,500 as my share. For all these offences we were not caught.

The offence for which I am here in prison occurred on 7th. September, 1989. On 4th. September, 1989, a Mr. Tembo, abutcher in Kabwata approached us and asked us to do a "job" for him. He said that he wanted a compressor, and several butcher's scales. On the day mentioned above, we broke into a local butchery around

4 hours and stole the items and delivered them to Mr. Tembo's house. Unfortunately, he changed his mind and said he did not need the compressor any more but kept the scales and paid us for them. I then took the compressor to my girlfriend's house for safe keeping. Two days later I took it to John, a friend of mine but who was not involved in that particular "job". He had promised to find a buyer for us.

The following day John hired a taxi driver to deliver the compressor to his customer. Unfortunately, the taxi driver happened to be a relative of the owner of the compressor. The following day, the owner of the compressor in the company of John and two policemen started looking for me. They found me in a local bar drinking. I tried to run away, but because I did not want to attract attention I gave up and was apprehended.

I was taken to Kabwata Police Station where I stayed in the cells for a week. None of my relatives knew what had happened to me as the police did not care to inform anyone. Two days after my arrest two police officers took me to a room. They did not ask me any questions about the offence, but put me on the Kampelu right away. Whilst on the Kampelu, they then started asking me questions. They said they wanted the truth from me, they would keep me on the Kampelu until I told them the truth. They wanted to know the names of my accomplices, and the whereabouts of the scales (the compressor had been recovered). I stayed on the Kampelu for some 15 minutes. The pain became unbearable and I told them what they wanted to hear.

After a week (on 16th. September, 1989), I was taken to court. I pleaded not guilty. The following day the case was withdrawn and the magistrate discharged me. I was immediately re-arrested, the reason being that my accomplices had been arrested and the police wanted to prepare a fresh charge against all of us.

I was the accused No 1 and this time I pleaded guilty, because my accomplices had been arrested and I saw no point in denying the charge. All of us were convicted on 3rd. October, 1989 and sentenced to 3 years imprisonment each with hard labour.

Appendix 4.

Research on Property Crime in Lusaka.

Questionnaire for Magistrates. (An abridged version).

PART I: Personal Attributes.

1 Age:

- 1. Below 21 years.
- 2: Between 22-35 years.
- 3: Between 36-45 years.
- 4: Above 45 years.

2 Sex:

- 1: Male.
- 2: Female.

3 Professional Qualifications:

- 1: Diploma in Magistracy.
- 2: LL.B + Bar Qualification.

PART 2:

Criminal Procedure, Sentencing and Rehabilitation of Offenders in Prison:

4 Previous research has established that about 60% of property offenders plead "not guilty". From the point of view of the Bench, why is this so?

5 Do you think there should be a law to prevent sending offenders to prison for failure to pay fines (in which case other non custodial measures should apply) ?

- 1: yes
- 2: no Please explain your answer briefly.

6 Do you think a situation of paying fines by instalments is feasible?

- 1: yes
- 2: no

Please explain your answer briefly.

7 Do you think the current range of non-custodial measures provided by the Penal Code (Cap 146 of the Laws of Zambia), the Criminal Procedure Code (C.P.C) (Cap 160 of the Laws of Zambia) and by any other law are adequate?.

- 1: yes
- 2: no

Please explain your answer briefly.

8 If the answer to the above question (7) is "no", what additional non-custodial measures would you like to be

introduced?.

9 Extra Mural Penal Employment (E.M.P.E), under section 135 of the Prisons Act (Cap 134 of the Laws of Zambia), is rarely ordered as punishment. From the point of view of the Bench, why is this so?

10 Are you in favour of minimum sentences as provided for theft of a motor-vehicle and stock theft?

1: yes

2: no

Please explain your answer briefly.

11 Before imposing a sentence do you consult your fellow magistrates in order to ensure some measure of consistency in sentencing?

1: yes

2: no

Please explain your answer briefly.

12 When imposing a sentence of imprisonment, do you ever take into account the availability of accommodation in prison?

1: yes

2: no

13 Do you think that there should be a law against sentencing first offenders to imprisonment unless there is no other way of dealing with them?

1: yes

2: no

Please explain your answer briefly.

14 From the point of view of the Bench, what possibilities are there for the rehabilitation of offenders in prison?

15 From the point of view of the Bench, what is (are) the main factor(s) behind the commission of property offences? How could these offences be curbed?.

Appendix 5.

Research on Property Crime in Lusaka.

Questionnaire for Practising Lawyers. (An abridged version).

I have been conducting research on the above topic. One source of data has been convicted offenders, some of whom I have interviewed. Serious allegations against the police, particularly with regard to the methods of interrogation and against court procedures have been made by over 80% of the offenders interviewed. As a leading member of the Bar, I would benefit from your comments on these matters.

1 Over 80% of the offenders interviewed claimed that they were assaulted (kicked, slapped or beaten with a horse pipe or a belt) by the police during interrogation. A high proportion of the 80% claimed that, in addition to assault, they were subjected to a form of interrogation known as the Kampelu, in which the offenders's hands and legs are tied and, using a metal bar, he is suspended between two tables with the head facing downwards. Do you think there is any truth in these allegations?

2 If these allegations are true, to what can you attribute them?

3 A number of offenders interviewed told me that the difference between understanding the charge and denying or admitting the charge, was not adequately explained to them in court, mainly due to poor translation. They further claimed that being "naive first offenders", they were convicted mainly because of their failure to appreciate the distinction between the two. What are your views on this?.

4 About 55% of all property offenders interviewed pleaded guilty. Some of those claimed that they were sentenced immediately without the facts of the case being presented by the prosecutor. What are your views on this?.

5 A number of jointly charged offenders who pleaded not guilty, claimed that they were convicted solely on the basis of the evidence of the co-accused. In your experience does this happen?.

6 If this happens, to what can you attribute it?.

K.T.Mwansa.

Appendix 6.

MAGISTRATES' COURSE (Basic). Outline of Syllabus.

1. Introduction to Law
2. General Principles of English Law ('O' level course)
3. Criminal Law
4. Criminal Evidence
5. Criminal Procedure
6. Civil Procedure (Introduction)
7. Statute Law (Selected statutes)
8. Interpretation and use of Statutes
9. Constitution
10. Contract (Introduction)
11. Tort (Introduction)
12. Local Courts
13. Legal Aid.
14. Communication Skills.
15. Human Relations and Humanism
16. Social Services (including probation)
17. Court Administration
18. Drafting Charges
19. Writing Judgments
20. Principles of Sentencing
21. Other magisterial duties: Inquests, Mental Disorders, Commissioners for Oaths, Prison visits.
22. Practical Moot.
23. Guest Speakers
24. Visits
25. Library
26. Tests
27. Course Administration

Appendix 7

MAGISTRATES' COURSE (Advanced). Outline of Syllabus.

1. Civil Procedure
2. Civil Remedies
3. Civil Evidence
4. Recent Statutes
5. Customary Law
6. Valuation Procedures
7. Local Courts
8. Legal Aid
9. Principles of Sentencing
10. Court Administration
11. Practical Moot
12. Assignments
13. Law Library
14. Quest Speakers
15. Visits
16. Course Administration

Appendix 8.

MAGISTRATES' DIPLOMA COURSE Outline of Syllabus.

FIRST YEAR.

1. Criminal Procedure: Practical moot, court visits, drafting charges, principles of sentencing, writing judgments, admission of guilty proceedings, arrest and prisoners' property book and juvenile proceedings.
2. Criminal Law
3. Interpretation and use of Statutes
4. Communications (English for specific purposes)
5. General Principles of English Law ('O' level)
6. Criminal Evidence
7. Library Skills
8. Other Magisterial Duties: Inquests, Mental Disorders, Commission for Oaths, Prison visits
9. Constitutional Law
10. Administrative Law
11. Introduction to Law
12. Legal Aid in criminal cases
13. Legal Profession: Ethics, Etiquette
14. Social Services including Probation
15. Visits
16. Quest Speakers
17. Tests
18. Course Administration

SECOND YEAR

1. Civil Law: Commercial law, Tort, Family law, Succession, Land law
2. Library Skills (visits, quest speakers)
3. Book-keeping and Accounts ('O' level)
4. General Principles of English Law ('O' level)
5. Communication Skills
6. Civil Procedure (court visits, court practicals, pre-trial procedures)
7. Civil remedies
8. Civil Evidence
9. Court Administration and Financial procedures
10. Zambian Customary Law
11. Local Courts
12. Legal Aid in Civil cases